

PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant : Mr George Evans
Scheme : Firefighters' Pension Scheme (**the Scheme**)
Respondent : Merseyside Fire & Rescue Service (as Employer and Scheme Manager)

MATTERS FOR DETERMINATION (dated 13 January 2007)

1. Mr Evans has complained that his application for ill health early retirement benefits under the Scheme was refused and in particular that the Respondent:
 - 1.1. refused to process his original application for ill health benefits and to refer the application to an independent medical practitioner;
 - 1.2. tried to influence the medical practitioner to avoid paying benefits; and
 - 1.3. displayed general maladministration resulting in errors and delays when handling his application.
2. Some of the issues before me might be seen as complaints of maladministration while others can be seen as disputes of fact or law and indeed, some may be both. I have jurisdiction over either type of issue and it is not usually necessary to distinguish between them. This determination should therefore be taken to be the resolution of any disputes of fact or law and/or (where appropriate) a finding as to whether there had been maladministration and if so whether injustice has been caused.

SCHEME RULES

3. The Scheme was governed, at the time of Mr Evans' original application for ill health early retirement benefits, by the Firemens' Pension Scheme Order 1992, as amended by the Firemen's Pension Scheme (Amendment) Order 2004, which came into force on 13 September 2004.

4. The following Rules are relevant:

4.1. **“A10 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.
- ((1A) In determining whether a disablement is permanent, a fire authority shall have regard to whether the disablement will continue until the age at which the person would otherwise be required to retire in accordance with rule A13.
- (2) Subject to paragraph (3), 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.
- (3) 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; if, as a result of such an injury, he is receiving in-patient treatment at a hospital he shall be treated as being totally disabled.
- (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.”

4.2. **“A15 Compulsory retirement on grounds of disablement**

- (1) Subject to paragraph (2), a regular firefighter may be required by the fire authority to retire on the date on which the authority determine that he ought to retire on the ground that he is permanently disabled.
- (2) A retirement under this rule is void if, on an appeal against the medical opinion on which the fire authority acted in determining that he ought to retire, the medical referee decides that the appellant is not permanently disabled.”

4.3. **“B3 Ill-health award**

- (1) This rule applies to a regular firefighter who is required to retire under rule A15 (compulsory retirement on grounds of disablement).

- (2) A person to whom this rule applies becomes entitled on retiring
- (a) if he is entitled to reckon at least 2 years' pensionable service or the infirmity was occasioned by a qualifying injury, to an ill health pension calculated in accordance with Part III of Schedule 2...

4.4. **“H1 Determination by fire authority**

- (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 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 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 fire 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 member, the fire authority, or any other party in relation to the same case.”

4.5. “H2 Appeal to medical referee

(1) Where –

(a) An opinion of the kind mentioned in rule H1(2) has been obtained, and

(b) Within 14 days of his being notified of the fire authority’s decision on the issue the person concerned applies to them for a copy of the opinion, the authority shall supply him with a copy.

(2) If he is dissatisfied with the opinion he may appeal against it to an independent person nominated by the Secretary of State as medical referee.

(3) A fire authority shall be bound by any decision on a medical issue duly given on an appeal by this rule.”

5. The Scheme was amended again in accordance with the Firefighters’ Pension Scheme (Amendment) (England) Order 2005 which came into force on 21 November 2005. There were no changes to the Scheme which are material to this determination.

MATERIAL FACTS

6. Mr Evans was born on 16 October 1953, and he started working for Merseyside Fire & Rescue Services (**MFRS**) in 1977. His normal retirement date was October 2008, when he would be 55.
7. Mr Evans started suffering from ill health during the course of 2004, and he sought the assistance of the occupational health department; his medical problems which, he said, were making his work extremely difficult, included stress, an injured left elbow and a stiff and painful neck, right shoulder and arm. He attended a medical review on 16 September with Dr David Jones, a consultant occupational physician, who diagnosed cervical spondylosis. After the review (which consisted of an interview but not a physical examination) he was referred for physiotherapy. He was, however, assessed as being fit for full operational duties and as such he was not offered light duties, nor advised to go on sick leave.

8. Mr Evans says that, as the physiotherapy had no effect on the spondylosis, he visited his GP, Dr Wright, who arranged for an X-ray and more physiotherapy. He also wrote to Dr Jones asking him for guidance on firefighting with cervical spondylosis, as he did not wish to make his condition worse. On 25 November 2004, he attended a full three yearly 'over 40s' health screening, which should, Mr Evans says, comprise a series of physical tests including a grip test, a physical examination undertaken in the light of those tests, and a musculoskeletal examination. Mr Evans says, however, that the physical examination was not undertaken and, instead, Dr Jones chatted about the cervical spondylosis. Mr Evans was again found to be fit for full operational duties, a decision with which he did not agree, and he requested an ill health discharge from the service. Mr Evans told the Occupational Health Manager that he had attended only six fire calls in five months and had worn breathing apparatus only once in that time.
9. Mr Evans' application was referred to Dr Jones, who reported, on 17 February 2005, to the Acting Chief Fire Officer (**the ACFO**) at MFRS:

"...For the purposes of this report I have had access to [Mr Evans'] Occupational Health records and full medical records from his GP, which include specialist reports.

Mr Evans is currently at work on full operational duties. He has had brief absences in November 2004 and January 2005.

Medical History

Mr Evans has cervical spondylitis (*sic*) with proven changes to the lower most discs in his neck on a recent x-ray.

The medical history is relatively short. For several years he has had intermittent problems with epicondylitis to his elbows (in the form of tennis and golfer's elbows). These have been treated on occasion and in both 1997 and 2000 this treatment was injections via a hospital specialist.

In 2004 he saw his doctor because of neck pain and stiffness. X-rays showed disc degeneration at 2 levels. Physiotherapy was arranged and medication was prescribed.

A short period off work ensued.

In January 2005 he aggravated his problem whilst working and again had some time off.

More recently he had a further injection for golfer's elbow.

In November 2004 he had a full health screen and based upon the range of tests required, was passed fit for operational duty.

In addition to his above problem(s), he has a mild hiatus hernia. This is not a cause of any serious medical disability.

Opinion

Mr Evans has coped with full duties and his neck disease has probably been present for a number of years although only recently becoming symptomatic.

He has indicated in a letter to myself that his doctor feels that his problems have been caused by accumulated trauma over years in the Fire Service and as a consequence further service will cause his condition to deteriorate.

I do not wholly subscribe to this view. Degenerative arthritis is common in the population and often has a familial tendency. Active management including exercise helps the condition.

Having said this, an exacerbation can be quite disabling in the short term and can lead to periods when a fire fighter would be unable to perform all the operational activity required.

He is currently at work on full duties having had about 13 days off in January.

He has requested a medical discharge citing comments made by his doctor.

There is no other medical history of relevance.

I am not certain that the independent doctors would accept this case, given the history but this report is nevertheless submitted for your assistance as Mr Evans has requested a discharge.”

10. The ACFO considered Mr Evans' file and wrote to him on 2 March 2005, saying that he did not consider that there were sufficient grounds to progress his application for an ill health discharge, but had requested nevertheless that his case be placed on the

- agenda for the next case audit, to be held on 15 March, which would be attended by Dr Jones and the Director of Human Resources; a final decision would then be made.
11. Mr Evans raised some concerns with the Occupational Health Adviser that the ACFO would be chairing the audit of a case on which (Mr Evans said) he had already made up his mind; he said he had understood that changes to the Scheme would result in such cases going straight to an independent medical panel and would 'prevent cases being blocked by Chief Fire Officers, as was the case previously'. His concerns about the procedure being followed were reiterated in a letter to the Human Resources/Pensions department, after he had been notified, in a letter dated 22 March, of the outcome of the case audit, that there was insufficient medical information to support an ill health discharge.
 12. On 29 March 2005, Mr Evans initiated the internal dispute resolution procedure (**IDRP**).
 13. In a letter dated 7 April, the Occupational Health Manager told Mr Evans that, having taken further advice about the procedures under Rule H1, his case would be progressed to an independent qualified medical practitioner. This was not part of the IDRP, which was suspended whilst the referral to the independent medical practitioner took place.
 14. On 8 April 2005, the ACFO wrote to Mr Evans, confirming the outcome of the case audit (that there was insufficient medical information to support an ill health discharge) and explaining the procedures which had been followed in considering Mr Evans' application. The ACFO told Mr Evans that he considered that MFRS had followed the correct procedures, and that Mr Evans' assertion that they had acted outside Rule H1 of the Scheme was incorrect; guidance from the Office of the Deputy Prime Minister stated that, under Rule H1, it was for the fire authority to decide, in the first place, whether the member was entitled to any, and if so what, awards under the Scheme. However, it was correct that the Service should now seek independent consideration of its decision which he would now ensure took place.
 15. Mr Evans sent the Occupational Health Manager some additional medical evidence which he wished the independent medical practitioner to take into consideration

(including GP records, physiotherapy notes, ‘Over 40s’ medical reports from 1997 and 2001 and an accident report form from 1986). That evidence was submitted to the independent medical practitioner, Dr Denman, on 23 May 2005, together with the occupational health records for Mr Evans, and some forms for completion. The Occupational Health Manager also wrote:

“If you require any further medical information for facilitating the provision of your opinion please contact Dr David M Jones on xxx. If you require any assistance with the management or administration of this case please do not hesitate to contact me on xxx.”

16. Dr Denman considered Mr Evans’ case on the basis of the papers submitted to him, but did not carry out a physical examination.
17. Dr Denman’s report, date 1 June 2005, was given on a standard form. Mr Evans’ incapacity was stated to be cervical spondylosis. In response to a series of standard questions, Dr Denman recorded that, in his opinion:
 - 17.1. Mr Evans **was** suffering from the incapacity detailed;
 - 17.2. he **was** disabled from engaging in firefighting;
 - 17.3. he **was** disabled from performing the duties of a regular firefighter additional to engaging in firefighting (where disablement meant incapacity, occasioned by infirmity of mind or body, for the performance of duty);
 - 17.4. the disablement was **not** likely to be permanent (where permanent meant that at the time when the question arose for decision the disablement seemed likely to be permanent); and
 - 17.5. the disablement had **not** been brought about, or contributed to, by the firefighter’s own default (to be answered in a medical context only).

Dr Denman commented that Mr Evans’ condition was likely to flare up intermittently and settle between episodes. No date for review was suggested.

18. On 24 June, the Occupational Health Manager wrote to Mr Evans to tell him that the independent medical practitioner had concluded that, although he was disabled from

engaging in firefighting and performing the duties of a regular firefighter, the disablement was not permanent. He said that the independent medical practitioner's opinion was binding on the fire authority and the authority could not therefore retire Mr Evans from service. Based on the medical opinion the Service would contact him in the near future to arrange a medical review in connection with his continuing sick leave absence.

19. On 1 July 2005, the Occupational Health Manager informed Mr Evans that, as he had been absent from work since 21 February, in accordance with service policy, he had been transferred into Community Fire Safety Reserve section, which offered employees the opportunity to return to work on a rehabilitative basis.
20. Mr Evans asked that the IDRPs be resumed and, on 27 July 2005, he received a Stage 1 decision from the Chief Fire Officer, who said:

“Further to your application for a decision under the [IDRP], received on 1 April 2005 (suspended), I confirm that I have carefully considered the matters raised and my decision is as follows:-

1. Your statement of complaint covered two areas, the first part of the complaint is that of the Service not processing your original application of request for medical discharge to an Independent Qualified Medical Practitioner (IQMP). We have now progressed your request in accordance with the Scheme guidelines and your case has been forwarded to and dealt with by the IQMP, therefore, this process I believe has resolved the first part of your disagreement.
2. With regard to the second part of your complaint, that of your dissatisfaction with the Service Medical Officer's Report which was submitted to the IQMP. Whilst the report of Dr Jones was submitted to the IQMP, the IQMP has reached his decision based on his own opinion, and the Authority is bound by the medical decision by the IQMP. I confirm the IQMP has declared you as suffering from Cervical Spondylosis, but has not declared the disablement permanent. The Authority therefore being bound by the opinion of the IQMP cannot medically discharge you from duty.
3. However, under the Scheme regulations should you be dissatisfied with the opinion of the IQMP you do have a right of Appeal under regulation H2. For information I can confirm the IQMP use all sources of records to enable them to make

their independent decision such as Occupational Health Records, GP Records and Medical Records.

4. Should you wish to lodge an appeal under this regulation please write to the Clerk of the Authority at the above address within fourteen days of the date of this letter stating the nature of your appeal and this will be dealt with accordingly under H2.”

21. Mr Evans asked for a Stage 2 decision in or about September 2005. He sent a submission in support, for consideration by the Appeals Committee. The essence of the submission was that Dr Jones’ and Dr Denman’s reports had been flawed, and had (in Dr Jones’ case) wrongly disregarded medical evidence from before 2004 as being not relevant. Mr Evans noted the reports which he considered to be relevant: an on duty injury report from 1986 and service medical reports from 1997, 2001 and 2004. He also considered that a certificate stating that he had no qualifying injuries had been wrongly issued to Dr Denman. He said:

“The omission of my service medical reports and on duty injuries ... from the report together with the issuing of the wrong certificate must have had some effect on the opinion of Dr Denman. The first documents that he will have read would have been the certificate suggesting that there were no qualifying injuries to consider and the report of a Consultant Occupational Physician which said there was, ‘no medical evidence of relevance’. If Dr Jones’s report is irrelevant to Dr Denman’s opinion then why does he write a report and give an opinion at all?”

22. MFRS also made submissions to the Appeals Committee; it said that the application had been processed in accordance with the regulations. It was not qualified to comment on the alleged flaws in Dr Jones’ report, but in any event it had not relied on that report because it had referred Mr Evans’ application to an IQMP, by whose opinion it was bound.
23. The Appeals Committee met on 26 September 2005. The Committee consisted of five councillors, of whom one, Mr Newman, chaired the meeting, which was also attended by a management representative from MFRS. Mr Evans had been invited to

attend but was content for the meeting to proceed in his absence. The complaint considered by the Committee was twofold:

- 23.1. that the report made by Dr Jones was allegedly misleading and inaccurate, and
 - 23.2. that his report influenced the ACFO and the Case Audit panel not to progress Mr Evans' application for ill health retirement, and that it had influenced the IQMP to find that his disability was not permanent.
24. The Committee found that it was not competent (not being medically qualified) to comment on the alleged inadequacies in Dr Jones' report, but in any event, MFRS had relied on the opinion of the IQMP, Dr Denman, and had followed both statutory requirements and guidance from the Office of the Deputy Prime Minister (**ODPM**) in dealing with Mr Evans' application. Mr Evans was also appealing to a panel of independent medical referees against Dr Denman's opinion, as he was entitled to do under Rule H2.
25. Mr Evans' appeal under Rule H2 had been received by MFRS on 18 August 2005 and was submitted by it to the ODPM on 12 October 2005. The ODPM then forwarded it to the Board of Medical Referees. The question for them to address was:
- “whether the incapacity as described by the IQMP as ‘Cervical Spondylosis’ is likely to be permanent.”
26. MFRS tell me that responsibility for convening an appeal hearing rests with the ODPM (now the Department for Communities and Local Government, but for consistency in this document I continue to refer to it as ODPM). There were some difficulties in the presentation of the medical evidence by MFRS to the ODPM, the ODPM then had to await confirmation that the Board had all the information they required, and finally the Board needed to avoid Mr Evans' holiday dates. The result of all this was that the Board's review was delayed, eventually taking place on 26 October 2006.
27. At the time of the review, according to a summary of the sick leave taken by Mr Evans provided to me by the respondents, Mr Evans was not on sick leave, though he had previously been off sick from 21 February to 11 September 2005 (203 days), then

17 February to 21 February 2006 (5 days), and then 18 September to 18 October 2006 (31 days).

28. I note here also, for the sake of completeness, that, over the course of about 12 months from August 2005, Mr Evans had been referred to a number of occupational physicians in connection with his employment. Copies of their reports have not been provided to me, but they were referred to in MFRS's submissions to the Board of Referees. In particular, MFRS submitted, on 5 October 2006, that it was 'required to utilise the services of Dr Ford and Dr Helliwell during the management of this case due to unfounded and unproven allegations being made to the General Medical Council (GMC) by Mr Evans against Dr David M Jones that led Dr Jones to inform the Authority that he had been advised by the Medical Defence Union that he should not examine Mr Evans'. The GMC confirmed in a letter to Mr Evans dated 19 October 2006, that it had not received a complaint from him in respect of Dr Jones or any other correspondence in respect of a complaint against a registered doctor.
29. The Board of Referees consisted of a chairman (Dr McVittie) and two members (Dr Pereira and Mr Ohio), all medically qualified. Mr Evans was present at the hearing and was represented by his union representative. MFRS was not represented. The appeal included a review of all the written information, a full clinical orthopaedic assessment, and detailed questioning of Mr Evans. A full report of the proceedings of 26 October 2006 was made which included the following:

“4 MEDICAL EXAMINATION

The Appellant was examined by Mr D Ohio, Consultant Trauma Surgeon on the 26th October 2006 at the Birchwood Park Centre, Warrington.

Mr Evans confirms that his clinical condition has remained constant over the past 2 yrs. He describes ongoing pain in his neck, shoulders and arms. His daily activities have been modified in the light of his cervical spondylosis. His neck pain varies between sharp and dull in character. Lateral neck movements aggravate his pain. Other aggravating factors include sitting at computer terminals, driving, lifting > 5kg weights, watching football, ie sitting for prolonged periods.

CLINICAL EXAMINATION

He was a pleasant and cooperative man. He weighs approx 95 kg and is 6ft 1” tall. Examination of his cervical spine showed normal lordosis. No bony tenderness on palpation. Neck movements provoked pain in the ipsilateral trapezius muscles. Foraminal compression did not produce any paraesthesia in the upper limbs. Examination showed a sloping/slanted shoulder bilaterally. Normal shoulder movements. Power was grade V bilaterally and normal.

CONCLUSIONS

This gentleman has been confirmed as having Cervical Spondylosis both clinically and radiologically. This is primarily constitutional in origin. However, it is a progressively worsening condition and is likely to be aggravated by physical loading to the neck and shoulders. Pain from this condition can be variable depending on physical activities. The mainstay of treatment is often to remain active and supplement this with analgesic and anti-inflammatory medications as and when required.

Mr D Ohio BSc (Hons) MB BCh FRCS

Consultant Trauma Surgeon

5 BOARD DISCUSSION

1. The Board were in agreement that the Appellant was suffering from the condition of multi-level cervical Spondylosis, confirmed both by x-rays and MRI scan.
2. The Appellant’s shoulder pain was part of this complex of degenerative change to the upper vertebral column. On clinical examination the Appellant was suffering from right shoulder impingement and tendonitis.
3. On the basis of the clinical findings, daily symptoms, and the fact that the condition had been present for over 24 months without significant improvement, the Board’s opinion was that the Appellant was unable to resume front line fire-fighting duties.
4. It was noted that the Appellant had only 2 years before his retirement age.
5. The Board felt that there was little likelihood of any advantage from further medical intervention. The cervical Spondylosis itself is untreatable. Steroid injection into the right shoulder might alleviate symptoms temporarily – but only for a short while – and without there being any prospect of significant functional benefit.

6. However, the Board recognised that the Appellant was currently working in a role (Community Fire Safety) which accommodated his physical restrictions and allowed him to remain in employment.

7. Thus when assessed against the test as to whether he is permanently unfit ‘for any duties as appropriate to his role as a fire-fighter (other than, or in addition to, engaging in fire-fighting)’ the Board’s conclusion was that the Appellant was not permanently disabled (as evidenced by his current employment in Fire Community Safety) and the appeal is therefore Not Upheld.

8. As to the appeal being considered frivolous, vexatious or manifestly ill-founded, the Board unanimously agreed that these heads of censure did not apply.

.....

BOARD CONCLUSIONS

After full consideration of the Appellant’s case, which included a review of all the written information submitted, a clinical (orthopaedic) assessment and discussion during the Hearing, the Board reached the following conclusions:

1. The Appellant was not permanently disabled.
2. The Appeal was not upheld.
3. As to the Appeal being considered frivolous, vexatious or manifestly ill-founded, the Board unanimously agreed that these heads of censure did not apply.”

30. Mr Evans remained dissatisfied and complained to me.

SUBMISSIONS

31. The MFRA submitted that:

- 31.1. the essence of the Appeal Board’s decision was that, while Mr Evans was unable to resume ‘front line’ firefighting, he was not permanently unfit for any other duties as appropriate to his role as firefighter (other than or in addition to engaging in firefighting); thus he was not permanently disabled;

- 31.2. nationally agreed rolemaps for firefighters are far wider than just firefighting (indeed wholetime firefighters on average spend only about 3% of their time engaged in firefighting). Firefighters also participate in Community Fire Safety and fire prevention work;
- 31.3. Mr Evans was physically capable of undertaking wider roles required of a firefighter (other than firefighting) subject to specified limitations; he was able to, and had, undertaken valuable Community Fire Safety work;
- 31.4. the MFRA was bound by the medical opinion of the Appeal Board and was therefore unable to justify a dismissal on grounds of ill health or to make an award of an ill health pension;
- 31.5. it had not processed Mr Evans' application for ill health benefits, including subsequent appeals, in an untimely manner or with any improper action or maladministration;
- 31.6. it had not sought to influence any medical opinion with a view to avoiding paying benefits to Mr Evans; it was true that the Occupational Health Manager had provided Dr Denman with Dr Jones' telephone number, but this information was provided out of courtesy and with no intention of seeking to improperly influence Dr Denman in reaching his decision;
- 31.7. all relevant information was supplied by it to the IQMP, to enable him to consider the medical issues;
- 31.8. the Regulations expressly provide for representations to be made to the Medical Appeal Board by both the Authority concerned, and the appellant, and MFRS's representations contained only information which it genuinely and honestly believed was correct. There was an inaccuracy about whether Mr Evans had made a complaint to the GMC about Dr Jones, but this was made without malice and MFRS had already apologised to Mr Evans about it;
- 31.9. Mr Evans had not been prejudiced in his claim for an ill health pension by any alleged delays or maladministration in the handling of the process by MFRS because the opinion of the Board of Medical Referees was that he was, in any event, not entitled to such a pension;

31.10. MFRS recognised the valuable contribution Mr Evans had made to the work of the respondent authority, and was prepared to continue to employ him until his normal retirement date; however, Mr Evans had chosen to retire on 14 May 2007, as he was entitled to do.

32. Mr Evans submitted that:

32.1. MFRS had not processed his original application for a medical discharge to the IQMP as required by the Scheme rules, and had only done so when challenged on this;

32.2. the amendments to the Scheme Rules had come into force in September 2004, while the case audit in relation to his application took place in March 2005, a gap of five months. MFRS could not therefore say that it was unprepared for the amendment which required it to seek the opinion of the IQMP before making a decision on an ill health application. Why had MFRS (Mr Evans asked) deliberately prevented his original application from reaching an IQMP when it knew this was a mandatory requirement?

32.3. MFRS had affected the outcome of his application by influencing the IQMP to find that his disability was not permanent: the Occupational Health Manager had given the IQMP the telephone number of the service medical officer to discuss his case, and medical information had been left out of a report. He also submitted that MFRS (again through the Occupational Health Manager) had supplied false information to the Board of Consultants in its submissions, in order to influence their decision;

32.4. Regardless of whether Dr Denman had or had not taken up the offer to telephone Dr Jones in connection with Mr Evans' application, he believed that they worked together for another fire authority, and he could not be sure that his case had not been discussed on an occasion when the two doctors met to determine applications for ill health benefits.

32.5. the Board of Consultants had declared him unfit for all work, when he was not, which reduced his pay by half;

- 32.6. it had delayed the processing of his pensions appeal by taking ten months to send medical records to the ODPM;
 - 32.7. it had refused to recognise the binding opinion of the Board, that he was permanently disabled from operational firefighting, refusing to redeploy him as a result;
 - 32.8. at the time of the hearing before the Board of Referees, he had been a long term member of the sick pool attached to the Community Fire Safety Department, which is used by MFRS to temporarily house sick firefighters with restrictions until they became fit enough to resume operational duties. The Department is staffed by ranks and non uniformed personnel, and there is no role within it for a firefighter. When he received notice of the outcome of the Appeal, he requested redeployment out of the sick pool in Community Fire Safety, but was told that, as the Appeal Board had not used the words 'permanently disabled', he was to stay in the sick pool until fit for operational duties or retirement, whichever came first;
 - 32.9. as a result of all the stress which the process, and the conduct of the MFRS had caused him, he had suffered a mental breakdown in 2005 which had required counselling and medication which he was still taking.
33. Mr Evans gave examples of what he considered to be general maladministration by the MFRS in dealing with his application:
- 33.1. an alleged refusal to place him in the Community Fire Safety Resource Section while he was on long term sick leave, and to recognise him as disabled with arthritis under disability discrimination legislation, which would have allowed him to return to work on a rehabilitative basis;
 - 33.2. an alleged refusal by MFRS to redeploy him following the appeal panel's finding that he was permanently disabled from firefighting. Mr Evans told me that in the 21 months following that finding he had worked in the Resources Section, with restrictions because of the poor state of his mental health, until his retirement;

- 33.3. MFRS's representations to the Board of Consultants regarding his allegations to the GMC about Dr Jones, which were unproven and unfounded, and their alleged need to use other doctors, and
- 33.4. MFRS's alleged delay in providing medical information to the ODPM in connection with his appeal to the Board of Consultants.

CONCLUSIONS

- 34. Ill health benefits are awarded under the Scheme to a firefighter who is subject to compulsory retirement on grounds of permanent disablement. Disablement is defined in Rule A10(2) as incapacity for the performance of duty; 'permanent' is defined as lasting until a member's normal retirement date. Although the Fire Authority makes the decision as to whether ill health benefits are payable (Rule H1), it is bound by the opinion of the IQMP to whom it must refer the application. Where the member is dissatisfied with the opinion of the medical practitioner, he may appeal against it to an independent person nominated by the Secretary of State as medical referee (Rule H2).
- 35. Although there was a consensus among the doctors who considered Mr Evans' application that he was indeed suffering from cervical spondylosis, there seems to have been a difference of opinion as to whether the condition was permanent, and whether it prevented him carrying out the wider range of duties required of a firefighter (that is, wider than just firefighting):
 - 35.1. Dr Jones (who reported on 17 February 2005) conceded that an exacerbation of Mr Evans' symptoms would be disabling in the short term and might prevent him from carrying out all the operational activities required;
 - 35.2. Dr Denman (who reported on 1 June 2005) stated that Mr Evans was disabled not only from firefighting but also from performing the duties of a regular firefighter, but he considered that the disablement was not likely to be permanent;
 - 35.3. the Board of Medical Referees (who reported on 26 October 2006) concluded that, while Mr Evans' condition was unlikely to benefit from any further

medical treatment, it did not prevent him working in a role which accommodated his physical restrictions and allowed him to remain in employment.

Mr Evan's sick leave history confirms that, at the time of the Board's report, he was back at work.

36. The fire authority is bound, under Rules H1 and H2, by the opinion of the independent doctors to whom the application or appeal has been referred. There is no discretion therefore in the fire authority's decision to award benefits (though if the opinion was on its face clearly inadequate I would expect the authority to take steps to address that). But there is no evidence that either Dr Denman's or the Board's reports were other than properly carried out and, though Mr Evans disagreed with their opinions, MFRS had no power under the Scheme Rules to come to a different view. I can see that Mr Evans' illness is the cause of much suffering to him, and that he has been under a good deal of stress, for which I sympathise. But in the light of the doctors' reports, MFRS could not have awarded him early retirement ill health benefits, and there was therefore no maladministration in its refusal to do so.
37. I have however gone on to consider Mr Evans' three particular complaints about the application and decision making process.
38. He has complained that the Fire Authority refused to process his original application for ill health benefits and to refer the application to an independent medical practitioner. Mr Evans first requested an ill health discharge (which would lead to the payment of disablement benefits under the Scheme) at the end of 2004, and his application was referred initially to Dr Jones, an occupational health physician, who did not support the request. Dr Jones' opinion was then considered by the ACFO. The ACFO appears to have reached an interim decision that ill health benefits were not payable, but the final decision was not made until the case audit on 15 March 2005, which was attended by both the ACFO and Dr Jones. Mr Evans expressed concern that the ACFO should be present at an audit at which, as Mr Evans saw it, the ACFO's own decision would be reviewed. But the ACFO's decision of 2 March 2005 was, in my view, a provisional one and it seems to me fair, and revealing no

maladministration, for the ACFO to give further consideration to, and seek further advice about, Mr Evans' application before coming to a firm view on the matter. It is true that this initial consideration by Dr Jones and the ACFO seem to have been an addition to the decision making process envisaged by the Scheme rules, and Mr Evans' complaint (denied by the ACFO – see paragraph 12 above) that the Fire Authority had acted outside the Rule H1 has some substance. Possibly there was some uncertainty about the procedure, since the amendments provided for by the Order of 2004 had only just come into force (though I have noted Mr Evans' view that the MFRS had had several months to assimilate the changes to the Scheme Rules which required a reference to the IQMP before making a decision on ill health applications). There was also a consequent delay in referring the application to the independent medical practitioner referred to in Rule H1. I do not consider that the delay caused any injustice to Mr Evans because at no stage was he considered entitled to ill health early retirement benefits, and it appears to me that the referral to the IQMP after, rather than before, any decision was made about his entitlement to ill health benefits was the result of a mistake, not a deliberate policy. However, the fact that the respondent added a decision making stage to that envisaged by the Scheme Rules, was clearly the cause of some genuine anxiety to Mr Evans, and would have added to the time taken to complete the process and I make a direction below in recognition of his distress and inconvenience in that regard.

39. Mr Evans also complained that the Fire Authority tried to influence the medical practitioner to avoid paying benefits. His particular concerns were that a telephone number had been provided to Dr Denman, and that information had been omitted from the evidence forwarded to him. There may be a fine line between trying to influence someone and trying to be helpful; providing a telephone number (even when the words, 'If you require any further medical information for facilitating the provision of your opinion'), does not seem to me to fall the wrong side of the line. In any event, there is no evidence that Dr Denman had any communication with Dr Jones about Mr Evans' application, either by telephone or in person, so no injustice has been suffered by Mr Evans. Mr Evans expressed concern, in his Stage 2 IDRP request, that Dr Jones' report, which Mr Evans regarded as misleading and incomplete, was the first thing that Dr Denman would have seen, thus influencing

him to reject his application. It is not clear that any relevant information was omitted from that provided to Dr Denman. Dr Jones had considered that certain reports were not relevant to the question before him, but Dr Denman saw them anyway, because Mr Evans – who considered that the reports were relevant – sent them to him via the Occupational Health Manager. It is not possible for me to make a finding about the order in which papers were presented to Dr Denman. Inevitably, the reviewing doctor will have to read the reports from doctors who have previously considered the application, because they are part of the evidence he or she has to take into account in reaching their decision. But there is nothing to suggest that Dr Denman was unduly influenced by Dr Jones' report, which in any event was just one of several pieces of information presented to him.

40. As regards MFRS's submissions to the Board of Referees, it was – as it has acknowledged - wrong to say that a complaint had been made to the GMC, and it is understandable that Mr Evans feels aggrieved that this was said about him. Did this reference in the submissions to a complaint to the GMC affect the outcome of the hearing? In my view, no, because the Board seem to have put to one side any peripheral arguments between the parties and to have considered only the question before them: whether Mr Evans' incapacity, diagnosed by the IQMP as cervical spondylosis, was permanent. Was it proper for MFRS to have made this particular submission? It appears to have considered it was a relevant part of the background to the appeal, a view which is not so unreasonable that I consider it to be maladministration for it to have done so.
41. Mr Evans' third specific complaint was that MFRS displayed general maladministration resulting in errors and delays when handling his application and he has provided me with some examples of what he considers maladministration. The first two of those concern his deployment within the fire service, and are essentially employment matters over which I have no jurisdiction. The third concerns the incorrect submission to the Board of Referees about a reference to the GMC, and I have dealt with that above. The last example concerns the delay by MFRS in submitting medical information to the ODPM, which allegedly contributed to the delay in the hearing of the appeal by the Board of Referees. It is not clear to what

extent, if at all, MFRS was slow to supply relevant information, and in any event it appears that this was only one factor in the time which elapsed before the hearing took place, (the other factors being difficulties encountered by the ODPM). I have noted also that the IDRPs and the appeal process under the Regulations were run concurrently; this seems to have been as a result of Mr Evans setting them in motion at the same time and I do not find he has been caused any injustice thereby. I have considered whether there was any other maladministration in MFRS's handling of Mr Evans' application, but have not found any.

DIRECTION

42. Within 28 days of the date of this determination, MFRS shall pay Mr Evans £150 in respect of the maladministration identified at paragraph 38 above.

CHARLIE GORDON
Deputy Pensions Ombudsman

25 January 2008