

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

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| Applicant | Mr D Kellaway |
| Scheme | Firefighters Pension Scheme (the Scheme) |
| Respondents | Surrey Fire & Rescue Service (the Authority) Surrey County Council (the Council) |

Subject

Mr Kellaway complains that the Authority and the Council have not followed the procedures used to re-assess his ill health retirement benefits, in particular:

- a. that their interpretation of an “independently qualified medical practitioner” (**IQMP**) is incorrect; and
- b. when re-assessing his benefits they failed to use the same criteria as were applied at the time of his medical retirement.

The Pensions Ombudsman’s determination and short reasons

The complaint should not be upheld because the practitioner appointed satisfies the definition of IQMP under the rules of the Scheme and although the assessment methodology changed, that was because it was applied properly the second time.

DETAILED DETERMINATION

Material Facts

1. Mr Kellaway was employed by the Authority from 1972 to 1974, as a retained fire-fighter and from 1974 to 1994 as a whole time fire-fighter. On 18 February 1994 he was medically retired due to an operational injury.
2. Upon his retirement Mr Kellaway became entitled to an ill-health award and an injury benefit under the respective provisions of rules B3 and B4 of the Firefighters' Pension Scheme Order 1992 (**FPS 1992**). The Authority and the Council state that at retirement, Mr Kellaway's disability was rated at 65%, as assessed by an independently qualified medical practitioner.
3. The injury award provisions were removed from the FPS 1992 and, in effect, transferred to the Firefighters' Compensation Scheme 2006 (the **Compensation Scheme**) when it was introduced with effect from 1 April 2006.
4. The Compensation Scheme defines an IQMP as:

"... a medical practitioner holding a diploma in occupational medicine or an equivalent or higher qualification issued by a competent authority in an EEA State, or being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State."
5. The Compensation Scheme also requires an IQMP to certify their independence as follows:

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

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

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

6. At the time Mr Kellaway’s award was first made, the amount was based on his degree of disablement related to loss of earnings capacity, under rule A10(3) of the FPS 1992:

“(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.”

7. The Authority and the Council state that what is described as “apportionment” (the consideration of factors which may affect the earnings capacity of an individual but which are not related to the Fire Service career) has therefore always formed part of the rules of the Scheme. However, they say it was not applied when calculating Mr Kellaway’s injury benefit.
8. This, they say, was consistent with the fact that it was not widely applied until after an appeal heard in the Crown Court in September 2004. A Mr Carlier had appealed against a determination of the Chief Fire Officer of Surrey County Council that his incapacity to work as a fireman should be apportioned as 20 per cent being due to a qualifying injury and 80 per cent due to a non qualifying pre-service injury. The appeal was dismissed. The judge determined that Rule A10 (3) allowed for apportionment between loss of earnings attributed to a qualifying injury and those attributed to a non-qualifying injury.

9. Following that appeal, the Office of the Deputy Prime Minister issued a Circular (Fire and Rescue Service Circular 9-2005) (**Circular 2005**) which provided guidance on the application of apportionment.
10. Circular 2005 stated that it was primarily a matter for medical expertise. It provided, as a guide, a model offered by the Association of Local Authority Medical Advisors. In summary, this model suggested the following course of action:
 - consider the causation of the disablement: *review the aetiological processes and factors that may have contributed to the disablement by reference, as necessary, to reputable texts and relevant peer reviewed journal articles.*
 - consider history, medical evidence and other relevant evidence: *review OH records, hospital records, GP records, accident reports, sickness absence records and any other relevant evidence and undertake further medical assessment of patient if necessary.*
 - identify qualifying occupational factor(s): *ensure all relevant qualifying occupational aetiological factors are included.*
 - determine relative contribution(s) of qualifying factor(s): *ascribe occupational factor(s) a percentage contribution to the disablement and total as necessary to establish combined contribution of qualifying occupational factors to disablement.*
11. Mr Kellaway's injury award was subject to a review in accordance with part 9, paragraph 1 of the Compensation Scheme and was referred to Dr McKee. Both the Authority and the Council state that Dr McKee, is employed by the Authority as occupational health physician and acts as IQMP in cases where he has had no previous involvement and satisfies the Compensation Scheme requirements regarding an IQMP in that:

- he was appointed in April 2001 and had not previously given an opinion or previously been involved in the case;
 - he had not previously acted as a representative;
 - meets the qualifications criteria as set out under the Compensation Scheme; and
 - was not acting as an occupational health adviser at the time he carried out Mr Kellaway's review.
12. As part of the review Mr Kellaway was seen by Dr McKee on 22 August 2007. The review also requires an assessment form to be completed by both the Authority and the IQMP, in this case Dr McKee. The Authority completed the assessment form by giving details of Mr Kellaway's earnings as a firefighter (£28,398.00) and the average earnings of three occupations for which he was considered suitable. The Authority obtained details of earnings based on 30 hours per week from the Annual Survey for Hours and Earnings (**ASHE**) survey 2006 in respect of customer services (£10,837.00), administration (£14,469.00) and retail sales (£8,744.00) which produced an average of £11,350.00.
13. On the assessment form the Authority calculated the unadjusted degree of disablement to be 60% as a result of a reduction in earnings of £28,398.00 minus £11,350.00.
14. Dr McKee completed and signed the assessment form on 23 October 2007 to the effect that in his view the apportionment of contribution of injury to disablement was 1%. He also confirmed the following:
- "I confirm that the occupations selected are within the capability of the [former] firefighter having regard to his/her medical condition.

I have not previously advised, or given my opinion on, or otherwise been involved in this particular case for which this opinion has been requested.

I am not acting, and have not at any time acted, as the representative of the above named [former] firefighter, or the fire and rescue authority, or any other party in relation to the same case.”

15. On 26 March 2008, Dr McKee wrote to the Chief Fire Officer with the results of the review that he had been requested to undertake:

“...The medical evidence in this case is clear, in that Mr Kellaway had a significant pre-existing osteoarthritis at the time of his index event, which occurred on 26 April 1993.

I understand that he was dismounting an appliance, felt a pain in his right knee and continued working for a further 1 hour. His knee became more painful and he was then taken to the Accident and Emergency Department, and subsequently had an arthroscopy performed to the right knee on 15 June 1993.

At the arthroscopy, there was no evidence of any injury leading to the acute flare up of his knee problems at the time of the index event. The diagnosis was extensive osteoarthritis, which was clearly of long standing.

There have been further problems with the right knee and also further injuries and it seems likely that he will in due course require further surgery to deal with these issues....

...His current earning capacity has been calculated by Lindsay Shaw giving an unadjusted degree of disablement of 60%.

I believe that it is reasonable to apportion 1% of his current degree of disablement to his qualifying injury, giving a final degree of disablement of 0.6%, i.e. in the 0-25% band."

16. The Authority and the Council states that Dr McKee is employed on a part time basis, for two days a week, which accounts for the delay between him signing the assessment form and providing his report to the Chief Fire Officer.
17. On 17 April 2008, the Council wrote to Mr Kellaway informing him that all the papers from Dr McKee had been sent to the Chief Fire Officer for consideration. It explained that apportionment, provided for under the FPS 1992, allowed the Authority to calculate the amount of the incapacity due to service and the amount that may have been caused by other factors. It confirmed that the Chief Fire Officer had accepted Dr McKee's opinion, in that his disablement should be revised to 0.6%.
18. Mr Kellaway complained under the Scheme's internal dispute resolution (**IDR**) procedure that in the "Guidance for Independent Medical Practitioners" (**Guidance for IQMPs**) it stated that an IQMP was not to act as an occupational health adviser to the Authority. The Panel dealing with stage two of the IDR procedures concluded that Dr McKee at the time he undertook Mr Kellaway's reassessment was not acting as an occupational health advisor to the Authority.

Conclusions

19. Mr Kellaway contends that the Authority and the Council have misinterpreted the definition of IQMP, when appointing Dr McKee who was, in his view, not independent as required by the Guidance for IQMPs.
20. Under the Scheme, an occupational health physician can also be appointed as an IQMP, but can only provide an opinion, as an IQMP, in cases where

he has had no previous involvement. However, I understand Mr Kellaway's concern that since Dr McKee was employed by the Authority he cannot be regarded as independent within the broad sense of the word. However, the particular regulations contain very specific requirements. These regulations required that for Dr McKee to fulfil his appointment as an IQMP, in this case, he had to be able to certify being employed and/or paid by the Authority did not itself disbar him from acting. The question is not whether he has ever acted as the Authorities representative (it may well be that Dr McKee had) but whether he had done so in the same case. There is nothing in the papers that indicates that he was acting as representative in Mr Kellaway's case. In addition Dr McKee had ethical obligations arising from his profession and it would require clear contrary evidence for me to find that in certifying that he was not acting as the Authority's representative, he did not so honestly. I am therefore satisfied that he was independent for the purposes of his appointment as an IQMP and as required by the rules of the Scheme.

21. There does not appear to be a dispute that apportionment was not applied when Mr Kellaway's injury award first came into payment in February 1994, despite it forming part of what was then rule A10(3).
22. However, by October 2007, when Mr Kellaway's injury award was subjected to a review in accordance with part 9, paragraph 1 of the Compensation Scheme, the application of apportionment had been given formal approval and was being more widely applied.
23. At the time of the review, on an unadjusted basis, Mr Kellaway's earning capacity was calculated as being reduced by 60 per cent. Having applied apportionment, Dr McKee's opinion was that only one per cent of this disablement was due to the qualifying injury, giving a final disablement of 0.6 per cent.

24. In his report to the Chief Fire Officer, Dr McKee qualified the basis upon which he reached that decision and that is that Mr Kellaway already had a significant pre-existing osteoarthritis at the time of the index event and so the injury was only nominally responsible for his ultimate condition.
25. Mr Kellaway is right in saying that the same criteria were not applied when his case was reviewed as were applied initially. However, apportionment was applied, on review, in accordance with the Scheme rules and guidance. Its application does not, therefore, amount to maladministration. The complaint is not upheld.

TONY KING

Pensions Ombudsman

18 January 2010