Newsletter

Pensions Ombudsman Service

LGPS ill-health newsletter

November 2015

The newsletter is not a definitive statement of the law; it is intended to provide some generic guidance on how the Pensions Ombudsman Service (the **Service**) may look to consider an ill-health complaint. It is intended to assist you in avoiding the potential pitfalls that may lead to complaints being made to the Service. Our newsletter has been written before the Service has investigated and determined any complaints in relation to decisions made pursuant to the Local Government Pension Scheme Regulations 2013 (SI 2013/2356), therefore the Service has not had the benefit of hearing and considering arguments in such cases. It follows that the newsletter should not be construed as exhaustive or representative of the view - or approach - the Service will take in all cases. This newsletter applies only to the LGPS in England and Wales.

Contents

References

All references in this newsletter to a 'regulation' or a 'schedule' should be read as references to The Local Government Pension Scheme Regulations 2013 (SI 2013/2356) (the **2013 Regulations**).

Guidance accompanying the 2013 Regulations

Regulation 36(4) says that the scheme employer and independent registered medical practitioner (**IRMP**) must have regard to guidance issued by the Secretary of State when carrying out their functions under regulations 36-38 (inclusive). The Department for Communities and Local Government (**DCLG**) issued guidance in September 2014 (the **DCLG Guidance**).[1] At the time of writing this is the most recent version.

The DCLG have also issued a 'frequently asked questions' document to be read alongside the guidance (the **DCLG FAQs**). At the time of writing the most recent version is from June 2015 (revised).[2]

The eligibility tests set out in this note reflect the DCLG Guidance and DCLG FAQs. The Service has not considered the DCLG Guidance or the DCLG FAQs and so has not taken a view as to whether those documents accurately reflect the position at law or the Service's view.

Ill-health retirement from active status – what should happen

Regulation 35: Questions for the scheme employer to determine

A decision of entitlement and amount shall be made by the scheme employer (after obtaining a certificate from an IRMP).[3]

If a member meets the 2 year vesting period,[4] under regulation 35 the scheme employer is required, further to regulation 36(1), to consider and decide two questions before entitlement to an ill health retirement benefit under that regulation can be awarded:

[1] Entitled "Local Government Pension Scheme: Statutory ill health retirement guidance to accompany the Local Government Pension Scheme Regulations 2013 (September 2014)".
[2] Entitled "Frequently asked questions – Ill health retirement – 2014 scheme – Edition 2 – June 2015 revised".
[3] See regulation 36(1).

- does the IRMP consider that the member's ill-health or infirmity of mind or body render the member permanently incapable[5] of discharging efficiently[6] the duties of the employment that the member was engaged in? (regulation 35(3)); and

- does the IRMP consider that the member's ill-health or infirmity of mind or body render the member not immediately capable[7] of undertaking any gainful employment[8]? (regulation 35(4))

If the member meets the 2 year vesting period and the two questions above are answered in the affirmative, there is a prima facie entitlement to payment of an ill health retirement benefit under regulation 35. To decide the level of benefit the employer must further decide which of the three tiers applies:

- Tier 1: is the member unlikely to be capable of undertaking gainful employment before reaching his or her normal pension age? (regulation 35(5))

- Tier 2: is the member unlikely to be capable of undertaking any gainful employment within 3 years of leaving local government employment, but it is thought likely that he or she would be able to do so before reaching his or her normal pension age? (regulation 35(6))

- Tier 3: is the member likely to recover sufficiently from the incapacity to enable him or her to be capable of undertaking gainful employment within 3 years of leaving local government employment or before reaching normal pension age (if earlier)?[9] (regulations 35(7) and 37)

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[4] See regulations 3(7) and 35(1). The DCLG Guidance suggests that the scheme employer must determine whether the member meets the two year vesting period (paragraph 9, DCLG Guidance).

[5] "Permanently incapable" means that the member will, more likely than not, be incapable until at the earliest, the member's normal pension age (schedule 1). According to the DCLG FAQs, the term "likely" in this context is to take on its normal everyday meaning as per the Oxford English Dictionary (Q&A 29, DCLG FAQs). See also paragraph 23, DCLG Guidance.

[6] According to the DCLG FAQs, "efficiently" (in relation to "discharging efficiently…") takes on its normal everyday meaning as per the Oxford English Dictionary (Q&A 27, DCLG FAQs).

[7] "Immediately capable" has not been defined in the 2013 Regulations or the DCLG Guidance. The DCLG FAQs suggests an approach to be taken in the event that the member is awaiting treatment or just had treatment (Q&A 26, DCLG FAQs). Also, guidance on the meaning of "capable of undertaking" can be found in paragraphs 26 and 27, DCLG Guidance.

[8] "Gainful employment" is defined as paid employment for not less than 30 hours in each week for a period of not less than 12 months (schedule 1). See also paragraph 24, DCLG Guidance.

[9] Regulation 35(7) provides that, subject to regulation 37, Tier 3 benefits are payable for so long as the member is not in gainful employment up to a maximum of three years from the date the member left the relevant employment. Further, regulations 37(5) and (6) provide that the payment of the benefits is subject to review. In accordance with the reference in regulation 37(11), an IRMP who provides a further medical certificate either at the review stage or within 3 years after the payment of Tier 3 benefits have been discontinued, may be the same IRMP who provided the initial certificate.

If the member is in part-time employment then additional questions may be required (see regulations 36(1)(c) and 39(9)(a)).

Regulation 36: Independent Registered Medical Practitioner

The IRMP must have the necessary qualifications. These are specified in the definition of "IRMP" in schedule 1. They must also meet some other requirements:

- where a certificate is obtained from an IRMP that IRMP must not have previously advised, or given an opinion on, or otherwise been involved with the particular case for which the certificate has been requested (regulation 36(2)) (note: an IRMP will not be treated as having advised, given an opinion or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case (regulation 36(2A)); and

- the IRMP must be approved by the administering authority, where necessary (regulation 36(3)).

Regulation 36(1) says that the IRMP is required to provide the scheme employer with a certified opinion as to:

- whether the member satisfies the conditions in regulations 35(3) and 35(4) and, if so

- how long the member is unlikely to be capable of undertaking gainful employment; and

- where a member has been working reduced contractual hours and had reduced pay as a consequence of the reduction in contractual hours, whether that member was in part time service wholly or partly as a result of the condition that caused or contributed to the member's ill-health retirement (regulations 36(1)(c) and 39(9)(a)).

Further, where a Tier 1 award is made (or, presumably, contemplated), the DCLG Guidance envisages that - for administrative purposes - the IRMP should be asked to give an opinion on HMRC's 'severe ill health' test.[10]

As envisaged by the DCLG Guidance[11], the role of the IRMP is to certify whether or not, in his or her opinion, on the balance of probabilities, the criteria for entitlement to an ill-health benefit

[10] Paragraph 39, DCLG Guidance.
[11] Paragraph 21, DCLG Guidance.

are satisfied in any individual case. In undertaking his or her work, the IRMP should apply the correct eligibility test (as set out in regulation 36(1)).

Where there is a divergence of opinion between an IRMP and other doctors the DCLG FAQs envisage that a scheme employer can expect the IRMP to provide an explanation.[12] The IRMP should explain, with reasons, why he or she considers the professional opinion of the other doctor(s) should not be preferred to his or her own.

The scheme employer's decision

The scheme employer has to decide the entitlement question. In deciding the entitlement question - both whether there is a prima facie entitlement to ill-health benefits and, subsequently, to which tier of benefits - the scheme employer's role is to exercise its judgment on an issue of fact. It is not an exercise of discretion.

A scheme employer cannot make a decision unless they have obtained a certificate from an IRMP. However, a scheme employer should not accept the IRMP's opinion blindly. If a scheme employer intends to rely on the IRMP's opinion, the scheme employer needs to satisfy itself that the IRMP has applied the correct eligibility test (as set out in regulation 36(1)).

In deciding the entitlement question the scheme employer should weigh up all the available evidence and come to a decision following similar principles which apply to an exercise of discretion. So, for example, the scheme employer should:

- apply the law correctly;
- ask itself the right questions;
- take account of all relevant and no irrelevant information; and
- make a decision that is genuine and rational and not perverse or irrational (i.e. not make a decision that no reasonable person could make in the circumstances).

The scheme employer is entitled to give more weight to some pieces of evidence than others - for example, it can prefer the IRMP's opinion to a view given by the member's doctor (or vice versa), provided it has considered all the evidence.[13] As set out above, if there is a divergence of opinion between the IRMP and other doctors a scheme employer can expect the IRMP to provide an explanation.

Whether the scheme employer chooses to see the underlying medical evidence on which the IRMP's opinion is based will be a matter of judgment for the scheme employer.[14]

[12] Q&A 37, DCLG FAQs.
[13] See Sampson v Hodgson (2008) All ER (D) 395 (Apr). See also Q&A 31 and 40, DCLG FAQs.
[14] Consent to obtain medical evidence may be required under the Access to Medical Reports Act 1988

The scheme employer's decision is to be made by reference to the date the member's employment terminates (regulation 35). The member is entitled to ill health retirement if the scheme employer terminates their employment on that ground and the member has met the 2 year vesting period. Responsibility for deciding the grounds on which the employment of a member has been terminated rests with the scheme employer (regulation 35(1)).

The Pensions Ombudsman's findings and directions

If a complaint is dealt with by the Pensions Ombudsman, the whole process may be considered i.e. both the scheme employer's original decision and the way the IDRP is dealt with at stages 1 and 2. If a complaint is upheld, it will normally be referred back to the scheme employer to look at again and make a fresh decision.

The Pensions Ombudsman's power to interfere is not to override a decision, but to see whether the decision-maker has acted in accordance with the powers which Parliament has confided in it. However, in the event that a scheme employer reaches a conclusion of fact that the evidence simply does not support, the Pensions Ombudsman may intervene with the scheme employer's decision and substitute its decision with one of his own.[15]

Ill-health retirement from deferred status – what should happen

Regulation 38

Regulation 38 provides the early payment of ill health retirement benefits in respect of the following:

- a deferred member (who left local government employment with an entitlement to a deferred benefit); and

- a member who has left his or her employment and becomes a "deferred pensioner member" by virtue of regulation 37(8). (Regulation 37(8) is where Tier 3 ill health benefits are discontinued because the member has, for example, returned to gainful employment.)

In respect of a deferred member, the member can ask for the early payment of retirement benefits where the member becomes permanently incapable of discharging efficiently the duties

[15] See, by way of example, the determination in Wilson (Q00140). See also Catchpole v Alitalia Pension Trustees [2010] EWHC 1809 (Ch).

of their former employment and is unlikely to be capable of undertaking gainful employment before normal pension age or for at least 3 years whichever is the sooner, as certified by an IRMP (regulations 38(1) and 38(3)).

In respect of a deferred pensioner member, the member can ask for the early payment of normal retirement benefits where the member is suffering from any medical condition which renders the member unlikely to be capable of undertaking gainful employment before normal pension age, as certified by an IRMP (regulations 38(4) and 38(6)).

In each case, the member would need to apply to their former scheme employer (or appropriate administering authority where the member's former scheme employer has ceased to be a scheme employer) for the early release of the deferred benefit (regulation 38(2) and (5)).

In the case of a review of a Tier 3 pension or early payment of discontinued Tier 3 pension, the IRMP appointed may be the same IRMP who provided the first certificate under regulation 36(1) (see regulations 37(11) and 38(8), respectively).

What might go wrong – things to look out for

In 2014/15, the Service investigated 78 complaints about ill-health retirement. Of these, 32 concerned the LGPS. Our experience in investigating and determining complaints about ill-health retirement in the LGPS suggests that the following common issues tend to come up (and further issues may arise under the 2013 Regulations):

Medical evidence and decision

- Has the IRMP applied the correct test?
- Has the IRMP considered permanence correctly? The relevant point is the permanence of the incapacity, not the permanence of the medical condition itself.
- Has gainful employment been considered properly?
- Has the scheme employer made a decision or simply adopted the IRMP's opinion without question?
- Where there is insufficient information or any uncertainty, has the scheme employer sought clarification from the IRMP?
- How is conflicting medical evidence addressed? If the IRMP's evidence is preferred over other medical evidence, is it clear that both have been considered; and is it clear why one has been given more weight than the other?
- Has the question of untried treatments been addressed properly? It is not enough simply to say that treatment options exist or that it is premature to conclude that the condition is permanent. The IRMP must be asked to give a view as to their likely effect and whether,

on the balance of probabilities, the condition renders the member permanently incapable of discharging the duties of the employment they were engaged in (along with the other criteria set out in regulations 36(1) or 38(3), as relevant). The same approach applies if there has been no diagnosis for the member's condition.

Procedure and Internal Dispute Resolution Procedure (IDRP)

- Is the certification complete, or is anything missing or incorrect?
- Has the scheme employer informed the member correctly of the decision with reasons? (failure to provide reasons is generally considered to amount to maladministration)
- Has the member been given correct advice about their right to appeal?
- Have all the procedures been followed correctly - both in relation to the original decision and the IDRP?
- Has the IDRP identified problems in the decision-making process and put them right?