

# Ill-health

## The Pensions Ombudsman's approach

When someone complains that they haven't been awarded the ill-health (or incapacity) pension they think they should receive, the Pensions Ombudsman's primary concern will be to consider whether the decision to award (or not award) the ill-health pension has been reached correctly.

The Pensions Ombudsman does not obtain his own reports from medical professionals, as his role is not to look at the medical evidence and make his own decision based on it. The Pensions Ombudsman might have come to a different decision or given different weight to the medical evidence, but that does not mean that the decision will be overturned.

The test that the Pensions Ombudsman uses is whether the people making the decision have:

- (1) correctly applied the applicable ill-health (incapacity) rule
- (2) obtained and considered appropriate evidence
- (3) asked the correct question and
- (4) has not made an irrational or perverse decision (i.e. no trustees properly advising themselves of all the relevant circumstances and properly directing themselves as to the test that should be applied could have reasonably so concluded)

The Pensions Ombudsman expects the decision maker to have genuinely considered whether the member meets the requirements under the rules or regulations of the scheme for the payment of an ill-health (or incapacity) pension taking into account the medical evidence. The decision maker shouldn't automatically follow the medical adviser's recommendation without giving the matter any thought.

## Who might be at fault?

Different pension arrangements have different rules about ill-health pensions. For example, sometimes the decision will be made by the employer, sometimes by the scheme's trustees or managers, or by a medical adviser or by a combination of all those people.

The Pensions Ombudsman will look to see whether the right body has made the decision.

## What the Pensions Ombudsman looks at?

The Pensions Ombudsman will investigate whether the decision maker has used their powers in a way that is consistent with the scheme's rules or regulations and the general law.

That means the decision maker will need to know what their powers are and what the test for the payment of an ill-health or incapacity pension is in the scheme.

For example, the scheme rules might be that the person cannot continue in their present job. Or there might be a much stricter test about whether someone can do any work at all.

The Pensions Ombudsman will also consider whether the decision maker has looked at all the relevant evidence, and not taken anything into account that was irrelevant.

For example, the decision maker will need to take account of the medical evidence and reports, though they can decide which to follow if the medical experts disagree. If there is

conflicting medical evidence from the scheme's own medical adviser and the member's own medical adviser, the Pensions Ombudsman will not overturn the decision merely because the decision maker has followed their own medical advice. If, however, the member's medical adviser's evidence raises issues which the scheme's medical adviser has not considered or conflicts with the scheme's medical adviser's advice the Pensions Ombudsman will generally expect the decision maker to have asked the scheme's medical adviser to comment further on why there is a conflict before reaching a final decision.

Overall the Pensions Ombudsman will decide whether the decision maker has reached a decision that makes sense based on the evidence. In other words, the evidence supports the decision and the decision is not irrational or perverse.

The Pensions Ombudsman will not overturn a decision just because the Ombudsman might have come to a different decision.

The Pensions Ombudsman can also look at other issues relating to the ill-health decision such as whether the process took the right amount of time or the person applying was kept informed and whether any defects in the process amounted to maladministration giving rise to distress and inconvenience.

### **What happens if the complaint is upheld?**

If the Pensions Ombudsman thinks the decision maker has gone about reaching their decision in the wrong way, the Ombudsman will usually direct them to make a fresh decision rather than directing them to pay the ill-health pension. The Pensions Ombudsman may want them to obtain more evidence or take other steps first.

The Pensions Ombudsman may also require them to pay a sum in compensation for any non-financial injustice, such as distress or inconvenience. Further information about awards for non-financial injustice can be found on the [investigating your complaint](#) page.

In limited circumstances the Pensions Ombudsman may substitute his own decision for that of the decision maker. However, the Pensions Ombudsman would only generally take this step if the decision maker has come to an irrational or perverse decision.

### **Ill-health - Example 1**

The Pensions Ombudsman received a complaint that an individual was not awarded an ill-health pension under the Teachers' Pension Scheme in the Isle of Man. Following an investigation of the matter the Ombudsman established that the ill-health test which had been applied was not the correct test for that scheme but a different test from a different scheme. The PSPA agreed to reconsider whether the individual qualified under the correct test without a formal determination being issued and also paid the individual an amount for distress and inconvenience.

### **Ill-health - Example 2**

In another ill-health case a complaint was made that an individual was entitled to take an ill-health pension from deferred status under the IoM Unified Scheme. Broadly under the Unified Scheme a deferred member can elect by giving written notice to the PSPA to take their pension early from deferred status if they meet the Upper Tier Ill-Health Criteria.

The Upper Tier Ill-Health Criteria, in respect of a Member, means ill-health or mental or physical incapacity that renders the Member incapable of gainful employment in circumstances where the Public Sector Pensions Authority, having regard to the advice of a Registered Medical Practitioner, determines that:

- (a) the ill-health or incapacity is likely to continue at least until the Member is age 65, or in the case of a Section 7 Member, 55 and
- (b) in the opinion of the Public Sector Pensions Authority, having regard to the advice of a Registered Medical Practitioner, the Member, has undertaken all appropriate medical treatment to reverse the medical condition

So in this case the decision maker was the PSPA and if the Member elects to take an ill-health pension from deferred status

- (1) the PSPA is required to determine whether the member has an ill-health or mental or physical incapacity that renders the Member incapable of gainful employment and
- (2) this is in circumstances where in the opinion of the PSPA having regard to the advice of a Registered Medical Practitioner:
  - a. the ill-health or incapacity is likely to continue to age 65 and
  - b. in the opinion of the PSPA having regard to the advice of the Registered Medical Practitioner, the Member has undertaken all appropriate medical treatment to reverse the medical condition

If the PSPA determines that the Upper Tier Ill-Health Criteria is met as a question of fact the pension is payable as of right. Unlike other ill-health rules there is no general discretion or consent requirement for the pension to be paid.

The member applied to take an Ill-Health Pension from deferred status. However, the PSPA, having taken medical advice from the Registered Medical Practitioner on the medical evidence submitted concluded that the test was not met. In the opinion of the PSPA on the basis of the medical evidence there was a possibility that the condition might improve before 65, as the member had not exhausted all the courses of treatment recommended by the medical practitioner to reverse the condition.

The member sought to challenge the decision via the internal disputes procedure and submitted supplementary medical reports clarifying and expanding on the earlier advice on the prognosis. Eventually the PSPA concluded that while the member did not originally meet the Upper Tier Ill-Health Criteria on the basis of the original medical evidence on prognosis and treatment options concluded, on the basis of the revised evidence, the prognosis was now such following the various courses of treatments that had been pursued, that the member met the criteria at a later date but confirmed its earlier decision that the member did not originally qualify. The member complained to the Pensions Ombudsman.

The Pensions Ombudsman concluded that the original decision by the PSPA that the member did not meet the Upper Tier Ill-Health Criteria could not be set aside. The PSPA can only have regard to the medical evidence before it at the relevant time of making the decision. The PSPA applied the correct test, the decisions were within what a reasonable decision maker would do based on the information it had at the time about likely prognosis and recommended treatment options and were not irrational or perverse. The Pensions Ombudsman also concluded that the PSPA was correct that the member met the test at the later date.

The Pensions Ombudsman did however make a distress and inconvenience award for £1000 for non-financial injustice as there were various flaws in the decision making process. This included at one stage using the incorrect earnings when determining whether the gainful employment test was satisfied although this made no difference to the eventual outcome of the complaint. However, it added generally to the distress and inconvenience and the length

of time taken to reach a conclusion on whether the member qualified for the ill-health pension.