

Ombudsman's Determination

Applicant	Mr L
Scheme	NHS Pension Scheme (the NHSPS)
Respondents	NHS Business Services Authority (NHS BSA) South Tyneside NHS Foundation Trust (the Trust)

Complaint Summary

Mr L, on behalf of the estate of his late wife, Mrs L, has complained that NHS BSA and the Trust, as Mrs L's former employer, mishandled her application for ill health benefits on the grounds of her limited life expectancy. Mr L says that, because of the poor handling, his wife's estate has not been paid the correct amount.

Summary of the Ombudsman's Determination and reasons

I do not uphold Mr L's complaint.

Detailed Determination

Material facts

1. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
2. The NHSPS is governed by regulations; the regulations in this case being the National Health Service Pension Scheme Regulations 1995 (**the Regulations**).
3. Mrs L was employed by the Trust. She was a member of the 1995 NHS Pension Scheme and her benefits are governed by the Regulations.
4. In early 2018, Mrs L was told that she had a limited life expectancy. On 26 May 2018, Mrs L submitted a form AW341 in which she indicated that she wished for all her ill health retirement benefits to be paid as a lump sum.
5. On 30 May 2018, Form AW33E was submitted on Mrs L's behalf, with the purpose of enabling her to take ill-health early retirement and to receive "tier 2" benefits, under Regulation E2A of the Regulations, on the grounds that she was permanently incapable of engaging in regular employment.

6. On 31 May 2018, the Trust wrote to Mrs L terminating her employment on capability grounds due to ill health and said that the necessary forms had been completed and sent to NHS BSA to enable her application for ill health benefits to proceed. Mr L says that this indicated that form AW33E had been submitted for consideration.
7. The letter also said that she was entitled to 12 weeks' Payment in Lieu of Notice (**PILON**), which would be paid as a lump sum, as well as 15 ½ days' untaken annual leave plus a further five days' leave due to the completion of 30 years' service. However she was then asked to complete form AW8. It was also recommended that form AW341 be completed so that the pension could be fully commuted, even though this had already been done on 26 May 2018.
8. On 3 June 2018, NHS BSA's medical advisers (**Medigold**) confirmed that Mrs L's ill health application was granted, but her pension could not be fully commuted because the Trust had not sent NHS BSA a completed form AW8. The Trust was asked to arrange for Form AW8 to be completed, and again, it was recommended that Form AW341 was also completed (although Mrs L had already completed and submitted Form AW341).
9. NHS BSA sent the Trust an AW8 to complete and return but on 6 June 2018 Mrs L died before the Trust had completed and returned it. Mr L says that the Trust should have completed the AW8 and submitted it at the same time as the AW341.
10. On 4 September 2018, the Trust emailed Mr L to confirm that NHS BSA had agreed that Mrs L's claim would not be classed as death in service, but that as form AW8 had not been completed NHS BSA needed to speak directly with Mr L, as Mrs L's nominee. The Trust said that it had explained to NHS BSA that Mrs L had completed form AW341 which confirmed her wish to fully commute her pension.
11. On 5 October 2018, NHS BSA wrote to Mr L. It said that although the medical advisers had approved Mrs L's application for early retirement on 5 June 2018 these could not be paid as Mrs L had not completed form AW8 to claim her retirement benefits.
12. It said that at the time her employment was terminated, Mrs L had five days untaken annual leave. In accordance with the Regulations her last day of service had to be extended by any untaken annual leave. As such her last day in the NHSPS was 5 June 2018.
13. It continued by saying that it had received the completed form AW33E and completed form AW341 on 1 June 2018. As neither of these was a claim for the payment of pension Mrs L was treated as having left the NHSPS without taking pension. Her entitlement to benefits was considered on a 'death within 12 months of leaving the scheme' basis. Therefore a lump sum death benefit was payable in accordance with Regulation F4 together with a survivor pension.
14. On 5 November 2018, Mr L wrote to NHS BSA to complain. He pointed out that his wife's application for IHRP had been approved on 3 June 2018 and her retirement

had taken place before she had died, whether that was on 31 May 2018 or 5 June 2018 as stated in NHS BSA's letter. He said that the operative wording in Regulation F4 was "becoming entitled" as opposed to "having claimed". He argued that the benefits could become payable whether it was claimed or not, unless there was a specific provision to the contrary. He said that nowhere in the Regulations did it state that the right to a pension was dependent on making a claim except on the grounds of ill health where his wife had indeed made such a claim.

15. Furthermore, there was no mention in the Regulations of form AW8. Mr L argued that his wife became entitled to a pension on leaving employment before her death under Regulation E2A. He asserted that the omission to file form AW8 was irrelevant as the direction in Medigold's letter of 3 June 2018 was directed at the Trust as, although parts had to be filled in by the member, it was for the employer to fill in much of it and for the employer to submit it.
16. In subsequent correspondence NHS BSA confirmed this position and said that Mrs L had died after her application for IHRP was accepted on 3 June 2018 but before the Trust had been able to arrange for the form AW8 to be completed as it was instructed to do by letter. It explained that a death lump sum was payable in accordance with Regulation F4 which is relevant to a member who has left pensionable employment without becoming entitled to a pension under Regulations E1 to E5. It conceded that form AW8 is not specifically mentioned in the Regulations but maintained that the 'claim in writing' that Mrs L was required to make was the form AW8.
17. On 3 June 2019, NHS BSA responded to Mr L. It said that it upheld his complaint in part. It agreed that 'death within 12 months of leaving' was not the correct level of benefit payable but that it was unable to authorise the payment of commuted ill health benefits. This was because the requirement of Regulation T1 was not met.
18. It also referred to the Trust's letter of 31 May 2018. It said that in accordance with Regulation C2(5) any outstanding annual leave must be pensionable and therefore extend Mrs L's last day of employment. It had made enquiries with the Trust and established that Mrs L's last day of pensionable employment was therefore 20 June 2018. As this meant that Mrs L had died before her last day of pensionable service death in service benefits were payable in accordance with Regulations F1 and G2. These benefits were: an Initial Survivor Pension (**ISP**) payable for six months and equal to Mrs L's rate of pensionable pay; a continuing survivor pension equal to one half of Mrs L's Tier 2 pension; and a lump sum equal to twice Mrs L's final year's total pensionable pay.

Summary of NHS BSA's position

19. The Trust contacted NHS BSA on 7 June 2018 to confirm that Mrs L had died the previous day before applying for her ill health pension. The call handler confirmed to the Trust that the case should be processed as a death in service claim as the evidence pointed to the fact that Mrs L had died before her last day of pensionable employment.

20. In September 2018, the Trust had emailed NHS BSA to advise that Mr L did not agree that his wife's case should be processed as a death in service and that he wanted NHS BSA to pay the commuted ill health benefits.
21. The Trust had confirmed that Mrs L had outstanding annual leave when she died and that this had the effect of making her last day in the NHSPS 5 June 2018. Therefore, the case was now being dealt with as a 'death within 12 months of leaving'.
22. At the IDRP Stage 2 it had noticed that the Trust had confirmed in its letter dated 31 May 2018 that Mrs L's employment would terminate on 31 May 2018, but that she was entitled to a total of 20½ days outstanding leave. The effect of this was to put her date of leaving pensionable employment back to 20 June 2018 in accordance with Regulation C2(5). As a result, as Mrs L had died before her last day of pensionable employment, death in service benefits were payable in accordance with Regulations F1 and G2.
23. It has paid a child pension to Mrs L's son but to date Mr L had not completed form AW9 to claim the survivor pension or the lump sum on death.

Summary of the Trust's position

24. Mrs L had wanted to progress with ill health retirement but had wanted to remain in employment until October 2018 when she would have achieved 30 years' service. This was also linked to a review of her mortgage. Options were discussed at a meeting with Mrs L and Mr L on 22 May 2018. This included advice regarding PILON and outstanding annual leave.
25. On 24 May 2018, Mrs L had contacted the Trust to say that she had been advised her condition was terminal and that she should consider serious ill health retirement.
26. Her application for ill health retirement was then progressed and her employment terminated on 31 May 2018. She was paid 12 weeks' PILON plus outstanding annual leave.
27. The Trust submitted form AW33 to NHS BSA on 29 May 2018 by special delivery.
28. On 5 June 2018, Mrs L received confirmation that her application for IHRP had been successful. The Trust had agreed to meet with Mrs L on 8 June 2018 to complete Form AW8. Sadly she died before this was possible.
29. On 5 July 2018, the Trust met with Mr L. He said that he disagreed with the NHS BSA view that his wife's death would be classed as being in service. The Trust agreed to contact NHS BSA for further guidance.
30. The Trust emailed NHS BSA on 27 July 2018, on 10 August 2018 and again on 21 August 2018 to ask for advice but received no response.
31. On 3 September 2018, the Trust telephoned NHS BSA. NHS BSA said it had no record of the Trust's previous emails. NHS BSA advised that the claim would not be treated as death in service but asked that Mr L contact it direct.

32. The Trust does not agree that it mishandled Mrs L's application for ill health retirement.

Summary of Mr L's position

33. Before her death his wife had applied for and been granted ill health early retirement. This being the case she was entitled to receive a pension under Regulation E2A and was also entitled to receive a lump sum payment under Regulation E6.
34. Because during her lifetime she had made the necessary application for a larger lump sum and a smaller pension and because she had also applied for the commutation of that smaller pension into a lump sum, by submitting form AW341 she became entitled to the lump sum she elected in lieu of the larger pension and that it fell to the Secretary of State to consider the commutation of the smaller pension under Regulations E2A (7) to (10).
35. It is to be expected that the Secretary of State would exercise that power given the importance which is attached to the member's life expectancy and the fact that his wife is now deceased.
36. The approach of the Trust and NHS BSA has lacked consistency. After his wife's death the Trust first took the position that the benefits which she had been promised would not be paid as she had died in service. The benefits were to be limited to a Survivor's pension and to a lump sum under Regulation F2. However, the Trust later abandoned that position and appeared to accept that she had died after she had retired.
37. NHS BSA then raised a new point which was that although his wife's employment had ended, no pension was payable as she had failed to submit form AW8 notwithstanding that she had requested early retirement and that this request had been granted during her lifetime. It took the view that entitlement to benefits was based on Mrs L having died within 12 months of leaving the NHSPS.
38. Following his appeal, NHS BSA restored the original view of the Trust that his wife had died in service. This was because his wife had not filed form AW8 in accordance with Regulation T1 and although her employment was terminated on 31 May 2018, and her early retirement approved on 5 June 2018, she was nonetheless still in employment at the time of her death on 6 June 2018 because her deemed period of service was extended owing to accrued leave that she had not taken.
39. He contends that the Trust in express terms terminated Mrs L's employment on 31 May 2018 and because she had requested early retirement, and that request had been granted, it followed that Regulation E2A conferred rights upon her in her lifetime and that her estate has succeeded to those rights.
40. Form AW8 is not to be completed only by the prospective pensioner, but also by the employer. It is most unlikely that a pensioner's entitlement to a pension should

depend on the completion of a form by the employer over which the pensioner has no control.

41. NHS BSA's guide 'NHS Pensions Online Guide', which is a guide that is directed at employers, provides that it is the employer who is responsible for submitting form AW8.
42. While Regulation T1 provides that a person claiming to be entitled to benefits shall make a claim in writing and that the Secretary of State may prescribe the form which such a claim might take it does not provide that the entitlement is contingent upon making the claim. If it were to do so, it would be inconsistent with all the provisions in the Regulations which set out the various benefits which exist and which set out expressly the conditions upon which entitlement depends. It would be perverse to interpret the provision in this way because its effect would then be to make Mr L's entitlement contingent upon the actions of the employer.
43. With regard to the contention that Mrs L's employment should be deemed to have continued by virtue of her entitlement to pay for untaken leave he submits that a period of employment is regarded as having been terminated on the date when the notice of termination takes effect. The fact that payment is made for a period thereafter will not override that which the parties have arranged or the employer has stipulated.
44. Regulation C2 (5) is not in point. It is directed at defining "pensionable service" and its purpose is to determine whether an employee has worked for long enough to receive a pension and to aid the calculation of that pension. The question as to when the entitlement to a pension accrues is dealt with by Regulation E and not Regulation C.
45. The terms "retires" and "terminated" in Regulation E2 are not defined and should be interpreted as ordinary English words. There is no reason to conclude that as a matter of ordinary interpretation these words should mean that a person whose employment is expressly ended as at a given date should be said to have retired later because payments are subsequently made to them.
46. The irrelevance of Regulation C2 to the question of when Mrs L's employment ended is apparent from Paragraph 5 which refers to people who have died. From that it follows that the Regulation does not have any bearing on when a person left his or her employment for the purpose of determining eligibility to receive a pension.
47. There are three reasons it does not follow that Mrs. L was entitled to unpaid leave at the time of her death:-
 - (1) The operative word in Regulation E2A is "retires". This word is not defined in the Regulations or the enabling Act and should be treated as an ordinary English word. The dictionary definition refers to the giving up or removal from an office. A working out of the financial consequences of retirement, by deemed extensions of the period of service or otherwise, does not affect the fact that one has ceased

permanently to discharge the functions of one's position and that one has therefore "retired" in the ordinary sense of that word.

- (2) There is therefore no necessity to construe Regulation E2A as applying only where the "pensionable employment", as defined under any of the other Regulations, has come to an end, provided that the member in question has actually retired. The use of the phrase "pensionable employment" in Regulation E2A(1) as in every other Regulation which deals with entitlements, can be explained simply by the fact that it is only pensionable employment which gives rise to entitlements under the scheme, whereas mere "employment" does not.
- (3) If, notwithstanding the above, one assumes, for the sake of argument, that some form of wording in Regulation C2 (5) extending the period of "pensionable employment" could be capable of restricting the ambit of Regulation E2A, Regulation C2 (5), the wording which actually appears in Regulation C2 (5) does not go far enough to have that effect. What Regulation C2 (5) actually says is that

"If, when a member leaves pensionable employment or dies, a payment is made in respect of leave not taken– (a) the member's pensionable employment **will be treated**, subject to paragraph (3), as continuing for a period equal to the period of leave for which payment is made." (emphasis supplied)

48. This wording shows that C2(5) is a deeming provision which relates solely to the length of service requirements for entitlement and to the extent of entitlement. It does not perform the extra function of extending the period of pensionable employment for other purposes.
49. It is also relevant to note that Regulation C2(5) deals identically with cases where the scheme member leaves pensionable employment during their lifetime and cases where the member dies. Because, in the case of a member who has died, it is unlikely to be correct to interpret the Regulation as extending any period of employment or pensionable employment, save for the purpose of determining or quantifying the member's entitlement, it is by the same token, unlikely to be correct to interpret the Regulation otherwise, with regard to any member whom the Regulation treats identically, namely a member who leaves whilst still alive.

Conclusions

50. I should note, at the outset, that the Regulations that govern the Scheme have been laid down by Parliament. Accordingly, it is not open to me to make a decision based on whether or not the effect of those Regulations is fair to the Scheme's beneficiaries. I am only able to assess whether NHS BSA has applied the Regulations correctly in the applicable circumstances.
51. Regulation E2A(1) provides as follows:

“(1) This regulation applies to a member who—

- (a) retires from pensionable employment on or after 1st April 2008;
- (b) did not submit Form AW33E (or such other form as the Secretary of State accepted) together with supporting medical evidence if not included in the form pursuant to regulation E2 which was received by the Secretary of State before 1st April 2008, and
- (c) is not in receipt of a pension under regulation E2.”

52. Regulation E2A(2) provides that:

“(2) A member to whom this regulation applies who retires from pensionable employment before normal benefit age shall be entitled to a pension under this regulation if—

- (a) the member has at least 2 years qualifying service or qualifies for a pension under regulation E1; and
- (b) the member's employment is terminated because of physical or mental infirmity as a result of which the member is—
 - (i) permanently incapable of efficiently discharging the duties of that employment (the “tier 1 condition”); or
 - (ii) permanently incapable of regular employment of like duration (the “tier 2 condition”) in addition to meeting the tier 1 condition.”

53. I note that, in paragraph (1) above, for Regulation E2A to apply, the member must have retired from “pensionable employment”. However, under paragraph (2)(b), termination of the member’s “employment” (not pensionable employment) is referred to.

54. It is clear, from the Trust’s letter of 31 May 2018, that Mrs L’s employment was terminated on 31 May 2018. It was also confirmed, on 3 June 2018, that Mrs L’s application for Tier 2 benefits had been approved. Therefore, the requirement under paragraph (2)(b) of Regulation E2A had been met.

55. However, it does not necessarily follow that, by virtue of Mrs L’s employment having been terminated, her pensionable employment had also been terminated on 31 May 2018.

56. “Pensionable employment” is defined, in Regulation A2, as “NHS employment in respect of which the member contributes to the scheme in accordance with [the 1995 section of the NHS Pension Scheme]”.

57. “NHS employment” is defined as “employment with an employing authority”.

58. “Employment” is not defined by the Regulations. However, its ordinary definition includes an agreement, between an employer and an employee, that the employee

will provide certain services in return for being paid by the employer. It does not necessarily follow that, to be employed for the purposes of defining “pensionable employment”, the employee has to be working at all times.

59. Under Regulation C2:

“pensionable service” is defined, for the purposes of ascertaining entitlement to benefits under the Regulations and for calculating those benefits, as including: “(a) any period of pensionable employment in respect of which the member contributes to [the 1995 Section] of the [Scheme] under regulation D1 (contributions by members).”

60. Under Regulation C2(5):

“(5) If, when a member leaves pensionable employment or dies, a payment is made in respect of leave not taken—

(a) the member's pensionable employment will be treated, subject to paragraph (3), as continuing for a period equal to the period of leave for which payment is made; and

(b) the payment will be treated as the member's pensionable pay for that period.”

61. Mr L has submitted that Regulation C2(5) is not relevant for determining when Mrs L’s entitlement to her Tier 2 benefits arose, as its purpose was merely to define “pensionable service” in order to determine whether an employee had worked for long enough to receive a pension and to aid the calculation of what that pension should be.

62. However, interpreting Regulation C2(5) as applying to the wider definition of “pensionable employment” under the Regulations would be consistent with the contrasting use of the terms “employment” (under Regulation E2A(2)(b)) and “pensionable employment” (under Regulation E2A(1)). Regulation C2(5) does not alter the date on which Mrs L’s “employment” ended, but it does have the effect of her “pensionable employment” having continued for an additional period after the termination of her employment, as the payment made in respect of her outstanding leave was pensionable.

63. Mr L has submitted that the reference, in Regulation C2(5), to a member’s death, must mean that the effect of Regulation C2(5) cannot be to extend the member’s pensionable employment to after the member’s death. However, I do not consider that Regulation C2(5)’s effect is unworkable in such a scenario. The effect of Regulation C2(5) in that instance is that the member dies in pensionable employment and, for the purposes of calculating the death benefits, the definition of the member’s pensionable pay would be modified by Regulation C2(5), for the purpose of calculating the lump sum payable on the member’s death, under Regulation F1(2).

64. Mr L has also referred to the case of *Dedman v British Building & Engineering Appliances Ltd.* [1974] 1 WLR 171, in which it was determined that the date for bringing an application before an Industrial Tribunal ran from the date of the notice of dismissal, not from the date up to which the employee was paid.
65. I consider that the circumstances of that case can, and should, be distinguished from those of this complaint. In *Dedman*, the question concerned the date on which the employee's employment was terminated, for the purpose of ascertaining the deadline by which that employee had to have made his application to the Industrial Tribunal. In this case, we are considering the date on which Mrs L's pensionable employment ended, for the purpose of ascertaining what her benefits under the NHSPS should be. The express provisions of the Regulations, which of course did not apply in *Dedman*, govern the interpretation of the term "pensionable employment" and when the period of pensionable employment ended, for the purposes of Regulation E2A.
66. Regarding Regulation T1, Mr L has submitted that:
- Regulation T1 does not provide that the entitlement to a benefit is contingent upon making the claim; and
 - It would be perverse to interpret the provision in that way, as its effect would be to make Mr L's entitlement contingent upon the actions of the employer.
67. I note that Mr L has said, in his cover letter (which is referred to, in the complaint form to my Office, as forming part of the substance of the complaint), that his complaint also includes the Trust, as:
- "A form AW341 had been completed, and it seems this form should be submitted with the AW8. In other words the Trust had failed or forgotten the AW8 form. Had this form been signed at the time of the AW341, it would appear the payments due, would have been made."
68. As I have explained in paragraphs 53 to 63 above, I do not consider that Mrs L had become entitled to a tier 2 benefit before she died, as (owing to Regulation C2(5)) she had not retired from "pensionable employment" when she died. Therefore, any failure on the part of the Trust concerning the completion and/or submission of Form AW8 had not affected Mrs L's entitlement to benefits under Regulation E2A when she died.
69. Mr L submits that the operative word in Regulation E2A is "retires" and that, as that word has not been defined in the Regulations, it should be treated as an ordinary English word. The dictionary definition referred to by Mr L is "the giving up or removal from an office". This is consistent with the dictionary definitions of "retired" that I have seen.
70. Mr L says that "A working out of the financial consequences of retirement, by deemed extensions of the period of service or otherwise, does not affect the fact that one has

ceased permanently to discharge the functions of one's position and that one has therefore "retired" in the ordinary sense of that word".

71. He further says that: "There is therefore no necessity to construe Regulation E2A as applying only where the "pensionable employment", as defined under any of the other Regulations, has come to an end, provided that the member in question has actually retired. The use of the phrase "pensionable employment" in Reg. E2A(1) as in every other Regulation which deals with entitlements, can be explained simply by the fact that it is only pensionable employment which gives rise to entitlements under the scheme, whereas mere "employment" does not."
72. It is not in dispute that Mrs L had retired from "employment". Reading Regulation E2A in isolation from the other provisions of the Regulations, a consequence of retiring from employment would be that the member had also retired from pensionable employment, the latter being employment in respect of which the member contributed to the Scheme.
73. However, as Mr L has pointed out, Regulation C2(5) is a deeming provision. It is therefore necessary to consider the scope of that deeming provision.
74. Mr L has submitted that "C2(5) is a deeming provision which relates solely to the length of service requirements for entitlement and to the extent of entitlement. It does not perform the extra function of extending the period of pensionable employment for other purposes." He has emphasised the words "will be treated" in Regulation C2(5) to support that argument:

"If, when a member leaves pensionable employment or dies, a payment is made in respect of leave not taken – (a) the member's pensionable employment **will be treated**, subject to paragraph (3), as continuing for a period equal to the period of leave for which payment is made."

75. I do not consider that there is any dispute that Regulation C2(5) is a deeming provision. It is the scope of that deeming provision that is in dispute.
76. Guidance on interpreting deeming provisions is set out in the case of *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22, at paragraph 27, with the caveat that the statements made in case law over the years are "useful but not conclusive", as "they may fairly be said to point in different directions, even if not actually contradictory". The following guidance is set out in paragraph 27 of *Fowler*:-
 - (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
 - (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

- (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
- (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
- (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, at 133:

“The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.”

77. In this case, Mrs L was to receive a payment, in June 2018, in respect of her untaken leave. I understand that that payment was to be the equivalent of the pay that Mrs L would have received for a period equal to the length of the period of untaken leave had she continued to work for that period. I understand also that contributions were payable to the Scheme in respect of the payment for untaken leave and, therefore, in respect of the period that the payment for untaken leave was deemed to cover. This accords with the extension of “pensionable employment” under Regulation C2(5). It is clear, therefore, that the scope of Regulation C2(5) is broader than Mr L has submitted, as it extends to modifying the meaning of “pensionable employment” under Part D (Contributions) of the Regulations. For example, Regulation D1 provides that:

“(1) Each member in pensionable employment must contribute to this Section of the scheme in accordance with the following paragraphs of this regulation.”

78. Looking at the Regulations more generally, it seems clear that members are not to receive pension benefits during and in relation to a period in which they are also receiving pay, and in which contributions are being made by them or on their behalf, for that same period. For example, Part S of the Regulations (Members who return to NHS Employment after Pension Becomes Payable) provides for a member’s pension to be either suspended or abated if they return to NHS employment after their pension has become payable.
79. Further, from a logical point of view, if a member were contributing to the Scheme during and in respect of any particular month, it would make no sense for the member to also be entitled to receive pension payments during that same month in relation to their pensionable employment in that month, as they would effectively be receiving extra benefits for that period.
80. If Mrs L had remained alive until 20 June 2018, when her pensionable employment was deemed by Regulation C2(5) to have ended, she would effectively have been in receipt of pay for that period, as well as contributing to the Scheme. During the

extended period of pensionable employment, Mrs L was entitled to death in service benefits and was effectively (by virtue of the payment in respect of untaken leave) in receipt of remuneration for deemed service. It would have made no sense for her to have been in receipt of tier 2 benefits for that period in addition to an amount equal to her normal pay for that same period.

81. It seems, therefore, that the deeming provision under Regulation C2(5) was intended to prevent members from contributing and receiving pay while, at the same time and in respect of the same period, receiving pension payments. On that basis, I do not consider that reading Regulation C2(5) as meaning that Mrs L remained in pensionable employment without having become entitled to her tier 2 benefits produces an absurd result.
82. While, in Mrs L's case, the benefits payable on her death in pensionable employment were less favourable than the benefits that would have been payable to her within her lifetime had tier 2 benefits become payable to her, it will not always be the case that scope of the deeming provision under Regulation C2(5) is disadvantageous to members and/or their survivors.
83. For example, if on retirement a member's pensionable employment is extended by Regulation C2(5) to a date beyond that member's actual date of retirement the lump sum payable on the member's death (should that occur during the extended period of pensionable employment) would in many cases be greater than that which would be payable if the member's pensionable employment had not been extended and they had instead died in retirement or with a preserved pension.
84. Mr L has also made the following point, concerning the application of NHS BSA's interpretation of Regulation C2(5):

"Here it also becomes relevant to note that Reg C2(5) deals identically with cases where the scheme member leaves pensionable employment during her lifetime and cases where the member dies. Because, in the case of a member who has died, it is unlikely to be correct to interpret the Regulation as extending any period of employment or pensionable employment, save for the purpose of determining or quantifying the member's entitlement, it is by the same token, unlikely to be correct to interpret the Regulation otherwise, with regard to any member whom the Regulation treats identically, namely a member who leaves whilst still alive."
85. Applying the principle that I have explained above, that a member should not be receiving pay while also receiving Scheme benefits in respect of that same period, and bearing in mind that death in pensionable employment will not, in all cases, lead to less generous benefits being payable in respect of the member, I do not consider that applying NHS BSA's interpretation of Regulation C2(5) to situations in which the member either dies in pensionable employment or leaves pensionable employment in their lifetime produces an incorrect result.
86. Therefore, I consider that the scope of Regulation C2(5) is broad enough to affect the interpretation of Regulation E2A in Mrs L's case, so that she must be deemed not to

have retired from pensionable employment prior to her death. As a consequence, Mrs L must be deemed to have died in pensionable employment, without having become entitled to tier 2 benefits under Regulation E2A(2).

87. So, to summarise, while I really sympathise with Mr L, I consider NHS BSA's interpretation of the Regulations, that Mrs L died in pensionable employment, to be correct. I appreciate that, in this case, the Regulations are disadvantageous for Mrs L's estate however, in other cases, members will benefit. It is not for me to interpret the Regulations differently on this basis.
88. That said, while NHS BSA's responsibility is to apply the Regulations correctly, as I have commented in paragraph 47 above my decision has not been made on the basis that the effect of the Regulations is fair in all cases. I consider that Mr L's complaint and the decision that I have had to reach in respect of it highlights the need for the Regulations to be looked at afresh. Mr L's complaint is the latest of a number of cases of this nature¹, in respect of which I have had to make a finding with regard to the application of Regulation C2(5) which has affected the entitlement of a deceased Scheme member detrimentally.
89. I do not uphold the complaint.

Anthony Arter

Pensions Ombudsman
29 April 2022

¹ See, for example, the cases of Mrs Webb (PO-4855) and Mr N (PO-26136).