

Ombudsman's Determination

Applicant	Mrs L
Scheme	Asda Group Pension Scheme (the Scheme)
Respondents	The Trustees of the Scheme (the Trustees)

Outcome

1. I do not uphold Mrs L's complaint and no further action is required by the Trustees.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs L's complaint about the Trustees is that they refused to award her an early retirement pension on grounds of "Total Incapacity".

Background information, including submissions from the parties

4. Mrs L was employed by Asda from 1979 and was an active member of the Scheme until her resignation in 2007. Therefore, she is entitled to a deferred pension under the Scheme.
5. In January 2015, Mrs L requested the early payment of her pension from the Scheme due to ill health. At that time she was 55 years old.
6. The applicable rules of the Scheme are contained in the 'Deed of Consolidation and Amendment' dated 10 October 2008 (the **Rules**). The relevant sections of the Rules are in the Appendix.
7. In March 2015, the Trustees sought advice from Medigold Health Consultancy Limited (**Medigold**), on whether Mrs L met the criteria for an "Ill-health" or "Total Incapacity" pension from the Scheme.
8. Mrs L's GP submitted a report to Medigold stating that it was likely that she would be unable to work in any capacity in the future.
9. Medigold considered the report from Mrs L's GP and a letter from a local psychological therapy service where she had undergone some treatment. On 7 May 2015, Medigold wrote to the Scheme administrator (the **Administrator**) saying:

- Ms L is said to have a history of anxiety and depression dating back to 2005. She continues to suffer symptoms of low mood, with low self-esteem, anxiety, panic attacks at night, poor sleep and tearfulness. The GP would consider this illness to be of moderate severity and had informed them that treatment, whilst helping the condition, has not fully alleviated the symptoms.
 - Ms L has not shown a great deal of response to the various treatments which have been tried to date and on that basis her GP thinks it unlikely that she will be able to work in any capacity in the future.
 - It is unclear whether Mrs L ceased to undertake the job she was doing at Asda due to her mental health difficulties, but it does seem that she was able to do that job for a while following the initial diagnosis in 2005. It is not clear whether she has been able to work in any other capacity since 2007. They suspect that she has not been able to given the difficulties recorded by her GP.
 - Mrs L's job with Asda was relatively demanding as a People Services Manager and from the description given by her GP of her mental health state, she would not now be capable of undertaking that type of work. On the balance of probability, it is unlikely that she could return at any point in the future to work at that level of intellectual demand. However, there are clearly ongoing therapies being used and the report from the clinical psychologist does not suggest that her condition is permanent to the extent that she will not at some point in the future perhaps return to work of a less demanding nature.
 - Therefore, on the balance of probabilities, they concluded that Mrs L would meet the definition of "Ill-health", but not "Total Incapacity".
10. On 22 May 2015, the Administrator wrote to Mrs L informing her that her request for early payment of her pension on grounds of "Total Incapacity" had been declined by the Trustees. They added that she was eligible to take her pension early anyway and asked whether she would like them to prepare a quote for her.
 11. In June 2015, Mrs L wrote to the Administrator saying that she was unhappy with the Trustees' decision and found it inappropriate that the grounds for declining her request had not been outlined. She said that, as she was unable to deal with the matter personally, she was authorising her partner, Mr Y, to act as her representative.
 12. The Administrator wrote to Mr Y pointing out the difference between the definitions and the benefits paid in respect of "Ill-health" and "Total Incapacity". They said that Medigold had forwarded a copy of the report to Mrs L, but attached a copy for reference.
 13. Mrs L appealed the Trustees decision and the matter was considered under the Scheme's internal dispute resolution procedures (**IDRP**). The IDRP decision was not to uphold her appeal. Consequently, Mrs L brought her complaint to us.

14. Mr Y, on behalf of Mrs L, says that she has not worked since she left Asda in 2007. She is currently in receipt of Employment and Support Allowance; is in a support group and she was awarded a Personal Independence Payment. She has also applied for a Disablement Allowance and was confident of a positive outcome in respect of this application.

Adjudicator's Opinion

15. Mrs L's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees. The Adjudicator's findings are summarised briefly below:
- The question that the Trustees needed to ask themselves is whether Mrs L satisfied the ill health condition and, if so, whether she met the conditions for an "Ill Health" or "Total Incapacity" pension. In helping them to make that decision, the Trustees sought the advice of Medigold. Medigold issued a report saying that she met the criteria for early payment of her pension on grounds of "Ill Health", but not "Total Incapacity". The report from Mrs L's GP says that she will be unable to work in any capacity in the future. However, the Trustees are entitled to rely on and give more weight to Medigold's report in reaching their decision.
 - The criteria for payment of Employment and Support Allowance, Personal Independence Payment and Disablement Allowance differ from that for a "Total Incapacity" pension from the Scheme. Therefore, the fact that Mrs L is receiving certain benefits under State Scheme does not mean that she should receive a "Total Incapacity" pension from the Scheme.
 - Our role is to decide whether the Trustees have correctly applied the Rules; asked the right questions; considered all relevant information; and made a decision properly. There is nothing to show that they misinterpreted the Rules; asked themselves the wrong questions; took irrelevant matters into consideration; and failed to make a decision properly.
16. Mrs L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs L has provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and therefore, I will only respond to the key points made by Mrs L for completeness.

Ombudsman's decision

17. In response to the Adjudicator's Opinion, Mrs L makes the following comments.:

- Her depression was first diagnosed by her GP in June 2007, after she resigned from Asda.
- There were a number of personal and work related factors which triggered her depression, including a culture of bullying and harassment in her working environment. She felt intimidated to request time off work to undergo loop diathermy treatment. These factors led to a deterioration in her health and impact on her ability to deal with day to day issues, so she resigned from Asda in June 2007. She was not able to work in any capacity since leaving Asda.
- Her post traumatic stress disorder was not diagnosed until 2013, after she commenced cognitive therapy treatment. The extensive treatment she received has not been effective and she feels that her condition has regressed since she undertook therapy.
- There was a degree of ambiguity in the Marigold assessment and the word "unlikely" is used on several occasions. Given the degree of uncertainty it is disappointing that they did not speak to her about these issues or arrange for her to attend a medical interview.
- In her view, the Trustees did not take into account all relevant factors. They had a duty of care to make additional enquiries to establish all facts in order to avoid a perception that they could be seen to discriminate against someone with complex mental health issues.

18. I have carefully considered the points made by Mrs L and set out my comments below.

- The personal and work issues she has mentioned are employment issues, which she should have raised while she was employed by Asda. I can only consider the process followed by the Trustees in considering her request for early payment of her deferred pension on grounds of ill health.
- In assessing Mrs L for ill health retirement on medical grounds, Medigold had considered a report from her GP and a letter from a local psychological therapy service. Details of the treatments she had undergone were considered. I do not consider it unusual or improper that Medigold assessed the matter based on the paper evidence and did not either speak to or interview her.
- I would agree that the Trustees have a duty of care to carefully consider all requests for benefits due under the Scheme. There is nothing to show that they have failed in their duty of care or took irrelevant matters into account in considering Mrs L for early payment of her benefits on grounds of ill health.

19. Therefore, I do not uphold Mrs L's complaint.

Anthony Arter

Pensions Ombudsman
10 October 2016

Appendix

The relevant sections of rule 5.7 say:

“(a) Subject to Main Rule 11.7, and to the production by the Member of any medical evidence required by the Trustees, the Trustees may, with the consent of the Principal Employer, pay an early pension to a Member if he is leaving Service because of ill-health or Total Incapacity and falls within one of the categories below...The Trustees have power conclusively to determine whether or not a Member’s ill-health or Total Incapacity is such as to bring him within the ambit of Rule 5.7.

(i) For a Member who joined the Scheme before 6 April 1999, the amount of the early Ill-health pension shall be the Member’s Early Leaving Pension. The amount of the early Total Incapacity pension shall be the Member’s Scale Pension, calculated on the basis of Final Pensionable Salary as at the date of actual retirement and the Pensionable Service the Member would have accrued if he had stayed in Service until Normal Pension Date.

...

(b) For the purpose of this Rule 5.7:

(i) **Ill-health** shall mean where, in the opinion of the Trustees, the Ill-Health Condition is satisfied but the Member could remain in employment with another occupation, whether with the Employer or elsewhere; and

(ii) **Total Incapacity** shall mean where, in the opinion of the Trustees, the Ill-Health Condition is satisfied and the Member is unable to work in his normal occupation and any other occupation.”

The relevant sections of rule 7.5 say:

“Where a Member is entitled to a deferred pension under this Rule 7 and the Member:

....

(b) falls ill or becomes incapacitated before reaching Normal Pension Date, and the Trustees decide that the Member would have been obliged to withdraw from Service on medical grounds had he still been in Service and would have been eligible for an early pension under 5.7,

the Trustees may pay an early pension in lieu of the deferred pension ...The early pension shall be reduced by an amount determined by the Trustees after consulting the Actuary (except in the case of a total incapacity pension which shall not be reduced)...”