PO-12475

Ombudsman's Determination

Applicant	Miss R
Scheme	Local Government Pension Scheme (**LGPS**)
Respondent	London Fire Brigade Headquarters (**LFB**)

Outcome

1. I do not uphold Miss R's complaint and no further action is required by LFB.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Miss R's complaint arises because LFB rejected her application for early release of her deferred pension benefits on ill health grounds.

Background information, including submissions from the parties

4. Miss R joined LFB on 12 June 1989 and became a member of the LGPS, with a normal retirement age of 65. LFB made her redundant from her post of Area Administration Assistant (**AAA**) on 19 April 2013 and she became a deferred member of the LGPS.

5. In March 2015, at the age of 55, Miss R submitted an application to LFB for early release of her deferred LGPS benefits. LFB was required to assess the application in accordance with the LGPS (Benefits, Membership and Contributions) Regulations 2007 (**the Regulations**). Relevant extracts are provided in Appendix 1.

6. Regulation 31 of the Regulations obliged LFB to obtain the opinion of an independent registered medical practitioner qualified in occupational health medicine (**IRMP**) as to Miss R's eligibility for benefits. The IRMP, Dr McKinnon, reached the view that Miss R was not permanently incapacitated from discharging the duties of an AAA efficiently. He submitted that, with assistance from government programmes to help people with mobility problems to return to work, such as the Access to Work Scheme, Miss R ought to be able to return to this role before age 65. Accordingly, LFB wrote to Miss R on 31 July 2015 to inform her that it did not consider she met the relevant LGPS criteria for early release of her deferred benefits.

7. Miss R appealed this decision, saying she had an injury to the ligaments in both feet and probable cartilage damage.

8. After examining additional medical evidence provided by Miss R, LFB issued its stage one response under the LGPS independent dispute resolution procedure (**IDRP**) on 10 February 2016. LFB said it did not consider that the medical evidence determined that Miss R met the relevant LGPS criteria for early release of her deferred benefits.

9. Miss R submitted an appeal under stage two of the LGPS IDRP on 4 March 2016. She notified LFB that she had upcoming outpatient appointments with Neurology. She also provided additional medical evidence, such as a letter dated 15 March 2016 from her General Practitioner (**GP)**, Dr Pai, which included details of her condition and its treatment.

10. LFB sent its stage two IDRP decision to Miss R on 31 March 2016. It explained that it was not satisfied that the available medical evidence established that her condition meant that she was permanently incapacitated from discharging the duties of an AAA efficiently.

11. A summary of the medical evidence is provided in Appendix 2.

Adjudicator's Opinion

12. Miss R's complaint was considered by one of our Adjudicators who concluded that no further action was required by LFB. The Adjudicator's findings are summarised briefly below:

    - The available medical evidence suggests that Miss R's condition had improved as a result of treatment.

    - None of the medical evidence submitted by Miss R comments on the impact of Miss R's condition on her ability to work. Accordingly, it does not establish that she is permanently incapacitated from discharging the duties of an AAA efficiently. As such, there is no inconsistency between the evidence provided by Miss R's treating doctors and the opinions reached by the IRMP.

13. Miss R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss R provided her further comments which do not change the outcome. In summary, these are:

    - With regard to her redundancy, LFB discriminated against her due to her disability and age.

    - She has not recovered from her foot problems and still suffers pain from time to time.

    - She has recently had an MRI scan of her left foot and is seeing a specialist on 12 May 2017.

- Her GP has informed her that she has osteoarthritis in both feet.
- She has stability and balance problems and as a result has been unable to work since December 2014.

14. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Miss R for completeness.

Ombudsman's decision

15. I note Miss R has mentioned that she considers LFB discriminated against her with regard to age and disability during the redundancy process. However, this relates to an employment matter which is outside of my jurisdiction. As such, I am unable to comment on this aspect of Miss R's complaint.

16. Turning to the points Miss R has made with regard to the medical interventions she is currently receiving, I can only review medical evidence that was available to LFB at the time it considered her application. Miss R will need to submit any new medical evidence to LFB for review as part of a fresh application for early release of her deferred LGPS benefits.

17. Regulation 31 of the Regulations required LFB to determine whether Miss R's condition:

- renders her permanently incapable, by reason of infirmity of mind or body, of discharging the duties of an AAA efficiently; and, if so
- whether, as a result of that condition, she has a reduced likelihood of being capable of undertaking any gainful employment for at least three years.

18. For the purpose of the Regulations, "gainful employment" is defined as, "paid employment of not less than 30 hours each week for a period of not less than 12 months".

19. Although Regulation 31 required LFB to obtain the opinion of an IRMP as to whether Miss R met the above criteria, the IRMP's views form only one part of the overall assessment of the application. LFB was obliged to weigh up all of the available medical evidence, not simply accept the conclusions of the IRMP uncritically. In particular, LFB had to ensure there was no omission of fact or misunderstanding of the Regulations by the IRMP.

20. Having reviewed Dr McKinnon's report dated 16 July 2015, I note that he says:

> "In conclusion, I found that Miss R was not, on the balance of probabilities, permanently incapable because of ill health or infirmity of mind or body, of discharging the full duties of her former employment (as an administrative assistant) which gave rise to the deferred benefits in the Local Government Pension Scheme".

21. In view of this, I am satisfied that Dr McKinnon had the correct LGPS criteria in mind when he considered Miss R's application.

22. I have also examined the medical evidence which Miss R provided in support of her application. In chronological order, the first is a report dated 22 March 2013 from Miss R's foot specialist, addressed to her GP, which provided a diagnosis of Pes Cavus and referred to splits in the skin.

23. On 10 November 2015, Miss R's Orthopaedic Registrar produced a report for her GP, in which she noted an improvement in her right ankle pain but continued pain and swelling in her right foot. She also mentioned that Miss R had been referred to neurology for further investigations.

24. On 28 January 2016, Miss R's Physiotherapist sent a report to her GP, in which he observed that her physiotherapy programme had resulted in an increase in her ankle mobility and strength and an improvement in her balance. He further noted that Miss R had achieved all of her rehabilitation goals and as a result had been discharged from the physiotherapy service.

25. On 30 March 2016, Miss R's Consultant Neurologist provided a report to her GP, in which he submitted that she could have demyelinating neuropathy and that she was unable to lift her ankle fully. He also observed that Miss R was quite hesitant when she walked.

26. Whilst these reports contain further information about Miss R's foot condition, they do not comment on how it impacts on her ability to discharge the duties of an AAA efficiently. As such, they do not establish that she meets the relevant LGPS criteria for early release of deferred benefits. Consequently, I find that there is no inconsistency between the medical evidence provided by Miss R's treating doctors and the conclusions reached by the IRMP. In this context, I can see no reason LFB should not have accepted the advice of the IRMP or changed its conclusions following Miss R's appeals.

27. Therefore, I do not uphold Miss R's complaint.

Karen Johnston

Deputy Pensions Ombudsman
9 March 2017

Appendix 1

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (as amended)

28. As relevant, regulation 31 provides:

> "(1) This regulation applies to -
>
> (a) a member who has left his or her employment before he or she is entitled to the immediate payment of retirement benefits (apart from this regulation) …
>
> (2) Subject to paragraphs (3) and (4), if a member to whom paragraph (1)(a) applies becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body, the member may ask to receive payment of their retirement benefits whatever the member's age.
>
> (3) A request under paragraph (2) must be made to the member's former employing authority or appropriate administering authority where the member's former employing authority has ceased to be a Scheme employer.
>
> (4) Before determining whether to agree to a request under paragraph (2), the member's former employing authority or appropriate administering authority as the case may be, must obtain a certificate from an IRMP as to whether in the IRMP's opinion the member is suffering from a condition that renders the member permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever is the sooner.
>
> …
>
> (8) In this regulation, "gainful employment", "IRMP" and "permanently incapable" have the same meaning as given to those expressions by regulation 20(14).

29. Regulation 20 (14) provides:

> "In this regulation -
>
> "gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months;
>
> "permanently incapable" means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and
>
> "qualified in occupational health medicine" means -
>
> (a) holding a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA State; and for the purposes

of this definition, "competent authority" has the meaning given by section 55(1) of the Medical Act 1983; or

(b) being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.”

Appendix 2

Medical evidence

30. On 22 March 2013, Susan Harrod, foot health service at Lewisham Healthcare NHS Trust, wrote to Miss R's GP, observing:

> "She has very small, broad feet with Pes Cavus and laterally loaded, she tells me she is one of twins and her sisters are similar. She mentioned problems with footwear but also of getting splits in the skin."

31. On 16 July 2015, Dr Michael McKinnon, IRMP, issued a report to LFB. He determined:

> "Ms R suffers from bilateral Pes Caves, which is a deformity of the foot with a high arched shape to the middle part of the foot. There are different causes, but I understand Miss R has been affected by a deformity of the feet since childhood, though it has become worse in recent years, for reasons which were unclear to me. I was assisted in the assessment by the following medical reports:-
>
> Stephen Hewitt – Foot Health Service Lewisham Hospital dated 22/03/2013, 04/03/2015 and 27/04/2015.
>
> Dr Sarah Bell, GP at the Triangle Group Practice, dated 30/04/2015.
>
> These reports confirmed that she was referred for assessment at the foot clinic in March 2013, when the diagnosis of Pes Caves was confirmed, and she was advised that some orthotic adjustments to her foot may be helpful. She tells me that she had a fall down the stairs in July 2013, when she injured both feet, and believes that her condition has been significantly worse since then …
>
> In other respects, her health is reasonable and I have no other permanent medical conditions to report or advise on …
>
> I did conclude that Miss R's mobility is severely affected by her foot condition, though she has recently had a worsening of the condition, and is awaiting further specialist assessment and treatment, such that a further improvement in her condition remains possible. I did see the mobility difficulties could potentially be overcome by one of the various mechanisms that exist to assist people with mobility issues attend regularly for work, such as the government's Access to Work Scheme, Taxi arrangements that can be supported by that scheme, or there may be other longer term adaptations, such as an adapted road vehicle … With these opportunities being available, I would see that it is possible for her to attend work regularly, and I did not find her 'permanently incapable, by reason of disability caused by physical or mental infirmity, of engaging in any regular full time employment' …

> Her previous job role as an administrative assistant would be a suitable type of employment for someone with her condition, as once at work, I would expect that the necessary walk about is relatively minimal, particularly if some adjustments and support can be given in the workplace. However, her previous employment was in Central London, which may not be a suitable location for someone with her disability, but I am unclear if an employment location closer to her home could be provided, and essentially I would see the issue of where she was previously working, and where she could potentially be offered work, as not something for medical consideration, so I did not find her 'permanently incapable … of discharging efficiently the duties of her former employment', but this is an area where her employer could perhaps consider applying some discretion, in consideration of the location of her previous job.
>
> In conclusion, I found that Miss R was not, on the balance of probabilities, permanently incapable because of ill health or infirmity of mind or body, of discharging the full duties of her former employment (as an administrative assistant) which gave rise to the deferred benefits in the Local Government Pension Scheme."

32. On 10 November 2015, Ms Grace Yip, Orthopaedic Registrar, produced a report for Miss R's GP, which concluded:

> "I reviewed this 55 year old lady in clinic today. She reports some improvement in her right ankle pain but she still gets mainly pain [sic] and swelling on the medial aspect of her right foot …
>
> Miss R's EMG studies revealed a likely phenotypically mild demyelinating polyneuropathy, with the lack of dispersion in more favour [sic] of a hereditary cause than acquired. Today I have referred her to orthotics and also advised her the mainstay of treatment for her ankle injury is physiotherapy, and it will also help with her balance issues. I have also referred her on to neurology for further review for HSMN."

33. On 28 January 2016, Tom Hodges, Physiotherapist, issued a report to Miss R's GP, in which he said:

> "[Miss R] had a congenital deformity of her feet, which caused a great deal of pain, some of which could be assigned to central sensitivity. She attended several physiotherapy sessions, where she was given exercises to strengthen and improve her ROM in her ankle and balance, and proprioception exercises. She was also given advice on self-management techniques. This has resulted in an increase in her ankle ROM and strength and an improvement in her balance. She has achieved all of her rehab goals and has therefore been discharged from the service."

34. On 30 March 2016, Dr Asra Siddiqui, Consultant Neurologist, wrote a letter to Miss R's GP. She stated:

> "In 2014, when [Miss R] was walking down the stairs, she fell and twisted her foot on the left side and since then she has been having quite a lot of pain. She has throbbing and bruising of the medial side of the left ankle. She also gets numbness and pins and needles in both feet, mainly on the left. It is mainly below the toes. Walking makes it worse. I understand she was made redundant. She was a hospital receptionist, but she had to do a lot of walking.
>
> She has had nerve conduction studies, which show that she has changes that could fit with a demyelinating neuropathy, possibly HMSN. It looks like a hereditary neuropathy …
>
> On examination, she does have high arched feet. On examination of the lower limbs, she has normal bulk, tone and power, but ankle dorsiflexion is a bit limited. She was not able to lift the ankle up fully bilaterally. Reflexes appeared to be normal, although I could not really elicit the ankle jerks. I also could not really tell the plantars because I had to go very gently because of the pain in her feet. Her gait was difficult to assess, but she is quite hesitant when she walks."