PO-13121

Ombudsman's Determination

Applicant	Miss D
Scheme	NHS Superannuation Scheme (Scotland) (**the Scheme**)
Respondent	Scottish Public Pensions Agency (**SPPA**)

Outcome

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

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

Complaint summary

3. Miss D is unhappy because SPPA declined her application for ill-health early retirement (**IHER**).

4. In particular, Miss D applied for IHER on 1 March 2016, on the basis of her ischaemic heart disease, fibromyalgia and sleep apnoea. However, SPPA declined her application on the basis that she does not meet the Scheme's criteria for IHER.

Background information, including submissions from the parties

5. Miss D was an active member of the Scheme until she left her previous employment in April 1998. After this date, her benefits were preserved until the Scheme's normal retirement age of 60. However, regulation E12(3) of The National Health Service Superannuation Scheme (Scotland) Regulations 2011 states:

> "[A] member will become entitled to receive the pension and retirement lump sum under this regulation before age 60 if-
>
> …(b) the member is not in NHS employment and the Scottish Ministers are satisfied that the member is suffering from mental or physical infirmity that makes the member permanently incapable of engaging in regular employment of like duration".

6. The regulations confirm that "permanently" means until normal retirement age; or age 60. In other words, for her IHER application to be successful, Miss D needed to show that her condition(s) would prevent her from being capable of working before age 60.

7. As part of reviewing Miss D's application, SPPA considered a number of medical reports concerning her conditions. These included a letter from her GP which stated:

> "[Miss D] has conditions which will prevent her returning to work at any point in the future. She had an MI in 2010 following which a stent was fitted and continues on medication for this which is stable. She was also diagnosed in 2011 by the Rheumatologists with fibromyalgia which gives her constant daily pain. Again she is on multiple medications for this but the pain can be so severe and significantly limits activities, therefore as stated before she will be unable to work again before she reaches retirement age".

8. As part of reviewing Miss D's IHER application, SPPA sought advice from an OH Assist medical advisor (**MA**). The MA noted that Miss D's ischaemic heart disease was currently stable and causing no regular symptoms. The MA also noted that her sleep apnoea was yet to be investigated, but that available treatment would significantly improve the condition in any event.

9. In relation to Miss D's fibromyalgia, the MA noted that she had not yet commenced recommended treatments, such as graded exercise and CBT. In addition, the MA advised:

> "The medical evidence indicates that, for fibromyalgia, there is a wide variability in outcome, with around 44% of patients not meeting the criteria for the condition at some point over a ten year period. (Walitt et. al. 2011). Most patients will find the symptoms fluctuate such that work becomes possible again. The opinion of the GP that disability is likely to continue is noted, but is not accepted because there [sic] insufficient evidence that the member has been provided with (and has implemented) the normal treatments for this condition, which rely on self-management strategies. Effective self-management is likely to improve fitness for work over a prolonged period, likely to span some years. It is not accepted that because she has had these symptoms for some time, that no recovery is likely at this stage. Most individuals who are provided with CBT therapy for functional symptoms such as these benefit from the treatment. Deale et. al. (2001) found that with cognitive behavioural therapy for chronic fatigue syndrome (which is now regarded as a different manifestation of the same medical condition), 68% reported being much improved or very much improved five years after therapy."

10. As a result of the above, SPPA was not satisfied that Miss D met the criteria for IHER. It declined her application, and Miss D brought the matter to our Office.

Adjudicator's Opinion

11. Miss D's complaint was considered by one of our Adjudicators who concluded that no further action was required by SPPA. The Adjudicator's findings are summarised briefly below:-

    - It is not for our Office to assess whether we agree with SPPA's decision, or reach an independent decision on Miss D's IHER application. Instead, our Office's role is to assess SPPA's decision-making. This involves investigating whether SPPA took into account all relevant facts, ignored irrelevant facts, asked the rights questions, and ultimately reached a decision that was not perverse.

    - SPPA has evidenced that it followed the necessary process when assessing Miss D's IHER application, and that it considered all and only relevant evidence.

    - Miss D's GP had submitted a report which strongly supported her application. However, in order to ensure its decision-making process was reasonable, SPPA only needed to consider the GP's comments. It did not have to agree with the comments and it would only be necessary for SPPA to act in accordance with them if it were perverse not to do so.

    - SPPA has evidenced that the GP's comments were reasonably considered. In particular, the MA was clearly aware of them and discussed the GP's comments in relation to their own findings. Furthermore, the MA explained why the GP may not be correct on this occasion, and provided evidence to support an alternative position. In other words, the MA provided SPPA with a conflicting but justified view to consider, and as such it was reasonable for SPPA to disagree with Miss D's GP.

12. Miss D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss D provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Miss D for completeness.

Ombudsman's decision

13. In responding to the Opinion, Miss D has sent a letter providing further details of how her conditions affect her daily standard of life, including her inability to complete ordinary household tasks without difficulty. I fully sympathise with Miss D; however, it is not for me to determine whether she will be able to work again before age 60. Instead, I can only consider SPPA's decision-making process in relation to her IHER application.

14. SPPA has a high level of discretion when considering matters such IHER applications, and I cannot interfere with this unless its decision-making process is flawed. In particular, it is not for me to agree or disagree with SPPA's decision; only to determine if its decision was reached in a proper manner and was within the range of

reasonable decisions which could be reached having regard to the evidence available.

15. Furthermore, the weight which is attached to any of the evidence is for SPPA to decide, including giving some of it little or no weight. SPPA has the discretion to prefer the advice of the MA unless it is clearly perverse for SPPA to do so. In this case, the MA has provided evidence to support their recommendations and challenge the GP's submission, including citing relevant medical research findings. The MA has therefore justified an alternative position to the GP's submissions. As such, I cannot say that it was improper for SPPA to prefer the evidence of the MA over that of Miss D's GP, or that it has reached an unreasonable decision.

16. I would remind Miss D that she is entitled to reapply for IHER in the future. SPPA would then assess whether she meets the criteria for IHER from the date of the new application. However, at this time, I do not find that SPPA has acted in maladministration by rejecting her IHER application of 1 March 2016.

17. Therefore, I do not uphold Miss D's complaint.

Karen Johnston

Deputy Pensions Ombudsman
10 October 2017