

Ombudsman's Determination

Applicant	Mrs Y
Scheme	Universities Superannuation Scheme (the Scheme)
Respondents	Universities Superannuation Scheme Limited (USS Ltd) (the Trustee)

Outcome

1. Mrs Y's complaint is upheld and to put matters right USS Ltd shall review its decision to pay her Total Incapacity benefits from 25 April 2017. It shall also pay Mrs Y £500 for distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs Y has complained that her application for incapacity retirement has not been dealt with in a proper manner.

Background information, including submissions from the parties

Background

4. Mrs Y was employed by the University of Newcastle upon Tyne (the **University**). She went on long term sickness absence in November 2015 and applied for incapacity retirement in April 2016. The relevant rules are contained within a deed dated 19 November 2015 (as amended). Extracts from the relevant rules are provided in Appendix A.
5. The University referred her application to its occupational health physician, Dr Pickering. He requested a report from the doctor named in the application form; Mrs Y's consultant psychiatrist, Dr Linsley, who responded on 16 March 2016. Details of the medical evidence relating to Mrs Y's case are provided in Appendix B.
6. Part III of the application form (ME5) was completed by Dr Pickering on 4 June 2016. He noted on the form that Dr Linsley had not completed Part II but had provided two reports. USS Ltd received Mrs Y's application on 13 June 2016.

7. On 21 June 2016, USS Ltd wrote to Dr Pickering saying a panel of its medical advisers had considered Mrs Y's case. It quoted the panel's comments:

"The medical panel has considered the evidence supplied here and notes the applicant is having the appropriate treatment. However, it is too early in the view of the panel to regard the condition as permanent as a recovery is still a prospect which would enable a return to work. The condition and associated impairment may not be permanent."

8. On the same day, USS Ltd also wrote to the University informing it that Mrs Y's application had been unsuccessful. No reasons were given for the decision but the University was informed either it or Mrs Y could appeal within the following six months. USS Ltd said an appeal could be accompanied by any new medical evidence not previously submitted.
9. Mrs Y sought further information from the University and on USS Ltd's website. She found a factsheet on incapacity retirement on the website but was not able to access an appeal form. The University sent her an appeal form and a factsheet. Mrs Y also requested a copy of the Scheme's trust deed and rules from the University and these were sent to her on 13 July 2016.
10. The Scheme's factsheet stated:

"... in order to qualify for incapacity benefits under USS, the incapacity must be determined on the balance of probabilities to be more likely than not to last for a period running from the date of the member's application ... to the greater of:

a) Five years; or

b) The period up to the average age at which members of USS retire ...

We will require a medical report from your doctor to assist the trustee's medical advisers in assessing your fitness to attend work and carry out your duties. You will therefore be asked ... to sign a consent form to obtain a medical report ... The contents of this report will be seen only by the trustee's medical advisers and a small number of senior personnel at the trustee ...

If additional medical information is required, you will be contacted by the trustee."

"If your application is rejected ... you may wish to appeal ... You or your employer can appeal by completing the USS appeal form and sending it to the trustee within six months, along with any new medical evidence not submitted previously.

Once an appeal is received the trustee will submit all of the medical evidence received in respect of your application to the panel of USS medical advisers. If the appeal is accepted, confirmation ... will be sent to you.

If the panel of medical advisers does not accept the appeal then the medical evidence will be submitted to an appropriate independent specialist in the illness or condition from which you are suffering.

The specialist will be asked to make contact with you and will arrange to meet you, ... and prepare an independent medical report. This report, together with all evidence submitted, will then be assessed by a member of the medical panel not involved in the original decision ...”

11. Mrs Y wrote to USS Ltd, on 26 July 2016, saying she was concerned about the validity of the decision because she did not think it had followed its own rules. The key points raised by Mrs Y are summarised below:-

- The medical panel had referred to her condition not being permanent but there was no requirement for the condition to be permanent. The Scheme factsheet referred to a condition being “long-term” and lasting for the greater of five years or the period to average retirement age. The definitions of “Partial Incapacity” and “Total Incapacity” in the Scheme rules both referred to long-term and not permanent.
- It appeared that the medical panel had rejected her application on the basis of Dr Linsley’s comment to the effect that the likelihood of successful progress with treatment for her Chronic Fatigue Syndrome (**CFS/ME**) might change if her other conditions significantly improved. Dr Linsley was not able to give an opinion on her other conditions because he was not treating them.
- The medical panel did not contact her or the University for further medical evidence about her other conditions. It could have sought evidence from her consultant neurologist, Dr Kennedy, or her GP, Dr Hubbard.
- Her condition was exacerbated by environmental factors, such as artificial lighting, noise and smell, which made employment in any role impossible.
- No details of the members of the medical panel had been provided.
- There appeared to be a difference between the appeal route and the dispute route and it was not clear which should be followed. She understood that, if her appeal was successful, her pension would only be backdated to the date of the appeal. She asked that the points she had raised be considered separately to any appeal.

12. USS Ltd wrote to Mrs Y on 3 August 2016. It said her letter had been presented to its medical panel on 29 July 2016 and quoted the panel’s comment:

“It is our view that the applicant is having the appropriate treatment but it is our view it is too early to regard the condition as long term, on the balance of probabilities.”

13. USS Ltd said the remit of the medical panel was to consider the medical evidence submitted with an application and make a recommendation to the Trustee. It said, if further evidence was referred to but not provided, the panel could ask for it to be obtained. Mrs Y was asked to send in any additional medical evidence from Drs Kennedy, Hubbard or Linsley. USS Ltd confirmed that there were two procedures which Mrs Y could follow:-
 - An appeal against the decision of the medical panel. As part of this, it would arrange for a specialist to provide an independent report.
 - The internal dispute resolution (**IDR**) procedure. It said this was designed to ensure that the law and the Scheme rules had been applied correctly.
14. Mrs Y submitted an IDR application on 8 August 2016. In addition to the points she had already raised, Mrs Y asked why a specialist in her condition was not appointed until the appeal stage. She also asked why the medical panel had not asked for further medical evidence. Mrs Y said she was trying to obtain reports from her doctors but this was proving difficult because they expected the pension scheme to contact them.
15. Mrs Y submitted a report from Dr Kennedy on 16 August 2016. USS Ltd subsequently wrote to Dr Pickering asking him to request an updated report from Dr Linsley. Dr Pickering had retired but his successor, Dr Moore, obtained a further report from Dr Linsley.
16. On 19 September 2016, USS Ltd wrote to the University saying it had approved Partial Incapacity retirement for Mrs Y with effect from 16 September 2016. It said this was the earliest date from which Mrs Y could retire but a later date could be agreed by the University, provided that this was within the next six months.
17. Mrs Y contacted USS Ltd asking why her retirement had not been approved from the date of her application. She said she wished to appeal the decision and requested further information about the difference between Partial and Total Incapacity. She also asked for more information about the medical panel: their areas of expertise, the basis on which they had awarded Partial Incapacity and whether they considered she would be capable of work within the next five years. Mrs Y asked for a copy of the minutes of the medical panel's meeting. She also asked for information about the person who would consider her appeal. Further information was provided for Mrs Y.
18. USS Ltd issued a stage one IDR decision on 20 October 2016. It did not uphold Mrs Y's complaint. Its decision is summarised below:-
 - Total Incapacity and Partial Incapacity were defined in the USS rules. Total Incapacity meant an individual would be unable to perform any job in the long term which would pay at least 10% of the salary for their existing job. Partial Incapacity meant an individual was unable to perform their existing job or a similar role in the long term.

- In both cases, “long term” was taken to mean a period of five years or until the individual reaches the usual USS retirement age, currently age 60, whichever was longer.
 - Its medical panel was required to give an opinion based on the evidence which has been provided. It was not responsible for obtaining the evidence. However, if the panel considered that evidence has been referred to but not provided, or the evidence was insufficient for it to reach a decision, it will request additional evidence. This was not considered necessary in Mrs Y’s case.
 - The Pensions Ombudsman accepted that different opinions could be given by different medical practitioners based on the same evidence. The opinions given by the medical panel were not unreasonable on the basis of the evidence available at the time.
 - There was no requirement for full minutes to be kept for the medical panel’s discussions. The opinion given by the panel was a summary of those discussions.
 - The right to incapacity retirement benefits arose on retirement and the benefits could not be paid prior to this. The date of Mrs Y’s retirement was a matter between her and her employer.
 - It had a dedicated and experienced team to assist with the application and appeals process.
 - If an appeal was submitted, its medical panel will consider any further evidence. It will arrange for a specialist’s report and, although not obliged to, will pay the costs. It did not obtain a specialist’s report before an appeal so as not to delay matters in the majority of cases which do not involve an appeal.
 - The factsheet had been reviewed and was not considered to be complex or confusing.
19. Mrs Y was informed that, although her IDR complaint had not been upheld, she could still appeal the decision to award Partial Incapacity retirement.
20. Mrs Y retired in November 2016. She appealed the decision to award Partial Incapacity retirement on 14 November 2016. She completed an IDR stage two form on 19 November 2016.
21. USS Ltd have said that its medical panel advised it to obtain a report from a psychiatrist or rheumatologist with an interest in CFS/ME. USS Ltd obtained an appointment with a consultant rheumatologist, Dr Walker, on 20 December 2016. There was further correspondence between Mrs Y and USS Ltd, during December 2016, relating to what information had or would be provided for Dr Walker and what he would be asked.

22. USS Ltd subsequently agreed also to consider a report from a neurologist. It advised Mrs Y, on 5 January 2017, that her case would be reviewed by its medical panel once both reports had been received. USS Ltd initially referred Mrs Y's case to a Dr Sinar. On 12 January 2017, Mrs Y informed USS Ltd that she was unable to travel as far as the hospital where Dr Sinar was based.
23. Dr Walker issued a report on 16 January 2017 (revised on 27 January 2017 to correct a typographical error).
24. USS Ltd issued a stage two IDR decision on 9 February 2017. It did not uphold Mrs Y's complaint.
25. Mrs Y applied to the Pensions Ombudsman (TPO) on 10 February 2017.
26. On 20 February 2017, USS Ltd informed Mrs Y it had referred her case to Dr Dorman. Mrs Y saw Dr Dorman on 21 March 2017. He issued a report on the same day. It was received by USS Ltd on 18 April 2017.
27. Dr Walker's and Dr Dorman's reports were considered by a member of USS Ltd's medical panel, Dr Oliver, who had not previously been involved in Mrs Y's case. He issued an opinion, on 25 April 2017, concluding that Mrs Y met the criteria for Total Incapacity retirement. USS Ltd advised Mrs Y she would receive Total Incapacity retirement benefits from 25 April 2017. Mrs Y queried the effective date of the award. USS Ltd responded by saying pensions would only be backdated when the original decision was deemed unreasonable. It said the decision, in Mrs Y's case, to award Total Incapacity retirement on appeal was based on further information from an independent specialist report and did not overturn the original decision.
28. In subsequent correspondence, USS Ltd said it was not Dr Oliver's remit to recommend the date at which Total Incapacity retirement benefits should be awarded. It said it had agreed that the date of Dr Oliver's report was the date at which all the medical evidence enabled the original recommendation to be overturned. USS Ltd said its medical panel had been asked to consider whether it wished to overturn its original recommendation before the formal appeal process had begun. It said this had taken place on 18 November 2016 and the panel had not overturned its original decision.
29. Mrs Y submitted a further complaint under the IDR procedure on 4 July 2017. In particular, she complained that there had been a delay in considering her appeal because USS Ltd had insisted on waiting for Dr Dorman's report. Mrs Y also complained that medical panel member had not considered whether the original decision had been reasonable.
30. USS Ltd issued a stage one decision on 9 August 2017. It did not uphold Mrs Y's complaint. It said:-
 - The appeal process was voluntary. There was no obligation for it to establish or maintain such a procedure. Its duty was to ensure that the Scheme rules

were applied correctly. It deemed the appeal process to be best practice and, over and above statutory requirements.

- The appeal process did not provide for more than one medical report but, to address Mrs Y's concerns, an additional report was permitted. The procedure did not specify what should happen in such circumstances because a second specialist referral was exceptional. It was entirely reasonable for it wait to put the appeal to Dr Oliver when all of the additional medical evidence had been received.
- There was no evidence to suggest that the medical panel's original opinion had been unreasonable. It was, therefore, unnecessary for the original decision to be reviewed.
- It had acted reasonably in agreeing to two specialist reports and there was no undue delay in obtaining these.
- Only when Dr Oliver had given his opinion was it in a position to determine Mrs Y's appeal and determine she was suffering from Total Incapacity. It was, therefore, correct that she should receive Total Incapacity retirement benefits from 25 April 2017.

Mrs Y's position

31. Mrs Y's submission is summarised below:-

- She does not believe that the USS procedure for incapacity retirement has been followed correctly.
- She does not consider the procedure fit for purpose.
- She has struggled to obtain clarification of the procedure. USS Ltd appears to expect members to understand the process without access to all relevant information. Her employer also found the process unclear. USS Ltd's website does not contain all the relevant information.
- USS Ltd is not transparent in how decisions are made. She had to request details of the members of its medical panel. Initially, USS Ltd claimed that no notes were kept but was able to provide more detail when pressed.
- The decision to award her Partial Incapacity retirement was delayed because the medical panel had not requested specialist medical evidence earlier; an independent medical report is only sought on appeal.
- If more information had been provided as to the medical evidence required, the delays could have been avoided.

- She asked if her case could be reviewed when the first specialist's report was available but was told it would only be reviewed when both reports were provided.
- There was a considerable delay in arranging an appointment with a specialist close to her home. She is unable to travel far and the first appointment was made with a doctor some 30 miles away.
- She does not consider her complaints were fully considered and investigated under the internal dispute resolution procedure.
- She has suffered considerable financial loss, and distress and inconvenience.

USS Ltd's position

32. The submission made on behalf of USS Ltd is summarised below:-

- There was considerable engagement with Mrs Y on the part of USS Ltd. The period from her first application, in June 2016, to stage two IDR decision, in February 2017, was just over 13 months.
- USS Ltd has fully met its legal and professional responsibilities. Mrs Y has not provided any detail as to where USS Ltd breached a legal duty.
- USS Ltd has fully considered all the available medical evidence and has a policy of pursuing all reasonable enquiries where appropriate. There were no occasions, in Mrs Y's case, where there was an apparent or reasonable need for further enquiries to be made.
- Mrs Y has not specified in what way the incapacity retirement procedure was not followed. USS Ltd acknowledge that its medical panel referred to "permanence" in its original decision, but this was corrected immediately. The panel confirmed that it had based its decision on a well-established understanding of the USS rules.
- The procedure has been reviewed by the Pensions Ombudsman, along with the USS literature and website, and USS Ltd's engagement with employers, on a number of occasions. There has not been any criticism of the structure and purpose. Mrs Y has not specified how the engagement and level or quality of information was deficient in her case.
- It is not clear what information, other than the stage two IDR form, was not provided through the USS website. There is no legal duty to provide a website and information is provided through a number of means.
- Mrs Y has not provided any detail as to in what way her employer was confused by the process. There is considerable expertise within all participating employers, including Mrs Y's employer.

- On the question of transparency, the basis of a decision is made clear in the communication. There is no legal duty to provide comprehensive detail of a decision. The tests being considered and the evidence being taken into account were all transparent; as was the reason for the decision.
- Considerable detail and explanation was provided for Mrs Y at all stages of the IDR procedure.
- USS Ltd is under an obligation to ensure that benefits paid under the USS are paid correctly and in accordance with the relevant rules. Where there are certain conditions for benefits to be paid, those conditions must be met.
- USS Ltd has a very robust process, involving significant resource from medical panels, internal management expertise and investment. This process includes a supplementary appeals process with additional resource. It is more involved and robust than industry standard.

33. Having seen an adjudicator's opinion, USS Ltd's solicitor provided the following further submissions:-

- To qualify for ill health retirement benefits from active service, the member must satisfy five separate and distinct conditions. One of those conditions is that USS Ltd "determines that the member is suffering from total or partial incapacity".
- If USS Ltd has not made this determination, one of the conditions is not satisfied and the benefits are not payable. Once the determination is made, benefits become payable as prescribed by the Scheme rules; provided that all the other conditions are also satisfied.
- Unlike with some public sector schemes, the Scheme rules do not provide the member with a right to ill health benefits if they are suffering from partial or total incapacity on retirement. Rather, the Scheme rules provide that there is a condition that USS Ltd determines that the member is suffering from partial or total incapacity before the member qualifies for benefits.
- The structure of the Scheme rules is such that a determination based on the evidence available at the relevant time is required. They do not provide for a continuing potential for new evidence to be introduced.
- The Scheme rules are clear that a determination by USS Ltd is necessary and it is only if this determination is flawed that it should be questioned.
- As with any other exercise of function/power by a trustee, the determination by USS Ltd has to be legally robust. There is much case law which provides guidance as to what is needed for a robust trustee decision. Broadly, this means that USS Ltd is required to: make reasonable enquiries; follow the Scheme rules; and come to a reasonable conclusion. Only if USS Ltd's

decision fails on these prescribed bases can its determination be questioned and reconsideration be required as a matter of law.

- The legal question is, therefore, not what state of health the member was in at retirement, because this is not a prescribed basis, but whether USS Ltd's determination on the medical condition of the member is sound.
- There is no general duty for the medical panel to request further evidence but it will do so where it considers it appropriate. This is principally if: further evidence is referred to but not provided; if it is unable to give an opinion on the evidence provided; or there is an assessment which has not been conducted.
- The application form provides the member with the opportunity to provide further evidence.
- If there is insufficient evidence for USS Ltd to make a determination, it is faced with either making no determination or making a determination based on the evidence it has before it. It is then a question for the member whether to seek further evidence or to leave service and apply for ill health retirement as a deferred member.
- If USS Ltd's original determination is considered robust, its determination should not be challenged because Mrs Y subsequently produced new evidence which supported her meeting the test for total incapacity. This is an example of the appeals process being used correctly and appropriately.
- The appeals process is not a mechanism to dispute or criticise the original determination. It is a procedural step to allow a further and more detailed review of a medical condition within a prescribed timeframe. Otherwise, an active member could have multiple conditions or be receiving an ongoing review of his/her medical condition indefinitely.
- If an appeal is not requested within six months of the original decision, there has to be a re-application and this can only be considered six months after the original application was rejected.
- The only way to re-open or question the basis of the benefits provided when Mrs Y retired is for her to raise a complaint under the IDR procedure. In this way, the determination by USS Ltd is considered in terms of the evidence which was obtained and taken into account, the requirements of the Scheme rules, and the actual decision.
- The appeals process is a voluntary process which allows members to have a continuation of the determination process; it is not an appeal of the merit or reasonableness of the original decision. It primarily allows for the member to seek additional evidence/opinion which will allow the medical panel to re-consider their application.

- The ill health fact sheet states:

“The specialist will be asked to make contact with you and will arrange to meet you, carry out a medical examination (including taking a medical history) and prepare an independent medical report. This report, together with all evidence submitted, will then be assessed by a member of the medical panel not involved in the original decision. After considering the appeal, if the recommendation is to accept the appeal then we will contact you and your employer to advise you. Your pension will normally only be paid from the date when the appeal was accepted (i.e. the point from which it was established that you were suffering from partial/total incapacity). It will not be paid retrospectively to when your case was first submitted.”

- If a member leaves service prior to the conclusion of the appeal, the Scheme rules dictate that the conclusion of the appeal has to be on the basis of the member applying in their changed position/status. In Mrs Y’s case, the appeal would therefore have to be based on the rules applicable to pensioner members receiving ill health early retirement benefits due to partial incapacity.
- Mrs Y could have deferred the termination of her service and waited for the conclusion of any appeal.
- There is a facility, under rule 15.14 (*sic*), if USS Ltd has not made a determination of partial or total incapacity before the member retires, for it to exercise discretion to award ill health retirement from active service. This mitigates the risk of two members retiring on the same day but having their benefits paid from different dates depending upon the availability of medical advisers. USS Ltd was unable to use this rule in Mrs Y’s case because it had made a determination.

Adjudicator’s Opinion

34. Mrs Y’s complaint was considered by one of our Adjudicators who concluded that further action was required by USS Ltd. The Adjudicator’s findings are summarised briefly below:-

- In September 2016, USS Ltd agreed that Mrs Y met the criteria for Partial Incapacity retirement. In other words, it agreed that Mrs Y was unable to discharge the duties of her role with the University or any similar role and was likely to remain unable to do so for the long term.
- Mrs Y had applied for incapacity retirement in April 2016 but her employment with the University did not cease until November 2016. This was the earliest date from which incapacity retirement benefits could be paid under the Scheme rules. One of the conditions for the payment of benefits under rule 15 was that the member retired.

- Following Mrs Y's further appeal, USS Ltd agreed that she met the criteria for Total Incapacity retirement. It informed Mrs Y that she would receive Total Incapacity retirement benefits with effect from 25 April 2017. In other words, from the date of Dr Oliver's report. It had said that Total Incapacity retirement benefits would only be backdated if the original decision was considered unreasonable. It had also said that the decision to award Total Incapacity retirement benefits was based on further information provided by an independent specialist report.
- Mrs Y had appealed the decision to award Partial Incapacity retirement benefits. Her position was, therefore, that she met the criteria for Total Incapacity retirement at the time her employment ceased. The question for USS Ltd was, therefore, whether Mrs Y met the criteria for Total Incapacity retirement at the date her employment ceased.
- USS Ltd had said that it determined that Mrs Y's Total Incapacity retirement benefits should be paid from 25 April 2017 because that was the date at which the evidence enabled it to make that decision. But this was not what was called for under the Scheme rules. Under rule 15, a member was entitled to Total Incapacity retirement benefits from the date of retirement if they met the eligibility criteria at that date. It was not a question of when USS Ltd had gathered sufficient evidence to enable it to make its decision; rather, it was a question of when Mrs Y met the eligibility criteria.
- Otherwise, a member's entitlement to benefits became dependent upon the administration process and the availability of doctors. This was inherently unfair because it could result in two members retiring on the same date but having their benefits paid from different dates simply because of when the medical advisers were available.
- USS Ltd had said that it would only backdate a Total Incapacity retirement pension if the original decision was considered unreasonable. This approach would not provide an appropriate outcome for an appeal against that decision if the evidence indicated that the member did meet the eligibility criteria at the earlier date. The test should be not whether the medical panel's opinion was reasonable; rather, it should be whether the member met the eligibility criteria at the date of retirement.
- USS Ltd had said that its medical panel was asked if it wished to overturn its original recommendation before Dr Walker's and Dr Dorman's reports were obtained. This seemed counterintuitive. If the appeal process allowed for the submission of further evidence, it would have been more sensible to ask the panel to review its decision after this evidence was available. USS Ltd may have meant that the panel was asked if it wished to overturn its recommendation and its response was to suggest further evidence was obtained. This did not amount to finding that its original recommendation was

reasonable or should not be reviewed. The fact that the panel suggested obtaining further specialist advice indicated that it felt its original recommendation could bear reviewing.

- The adjudicator noted that rule 15.11 provided for USS Ltd to make a later finding of Total Incapacity. This sub-paragraph to rule 15 provided that, in the case of a member who was in receipt of Partial Incapacity retirement benefits, USS Ltd may determine that the member was suffering from Total Incapacity and pay enhanced benefits. It provided for USS Ltd to “pay an enhanced incapacity pension at the level at which it would have been payable had the pensioner member retired on the grounds of total incapacity when this rule 15 first applied to that pensioner member”. It did not specify the date at which the enhanced pension should take effect. However, the fact that this was a “later finding” in respect of a member who was already in receipt of benefits suggests that it was intended for USS Ltd to consider whether the member’s health has declined since retirement. In such circumstances, it would not be unusual for the enhanced pension to be paid from the date the member met the Total Incapacity criteria, which may be later than the date of retirement. There was, however, also provision for an amount equivalent to the lump sum which would have been paid if the member had retired on the grounds of Total Incapacity. This suggested backdating to the date of retirement.
- In any event, in the adjudicator’s view, this was a separate matter to the question of Mrs Y’s appeal. The appeal was against a decision made under rule 15.1.3. In order to properly address Mrs Y’s appeal, USS Ltd had to determine whether she met the Total Incapacity criteria as at the date of her retirement. If it came to the conclusion that she did, the Total Incapacity retirement benefits would be payable from that date. USS Ltd might, having addressed that question and having found that she did not, go on to consider whether her health had since declined such that it wished to make a later determination under rule 15.11. The evidence did not indicate that this was the approach taken by USS Ltd.
- In the adjudicator’s view, the evidence indicated that USS Ltd did not consider Mrs Y’s appeal in a proper manner. She had suffered injustice inasmuch as it had yet to be established whether she was in receipt of the correct level of benefits. Her complaint could be upheld on that basis.
- Mrs Y had raised a number of other points relating to the consideration of her application for incapacity benefits. Having found grounds for her case to be upheld, the adjudicator did not believe it was necessary to go into these in detail but provided further comment as follows:-
- The adjudicator noted Mrs Y disagreed with the medical panel’s earlier use of the word permanent. The Scheme literature described the criterion as incapacity likely to last for greater of five years or the period up to average

retirement age. The adjudicator acknowledged that rule 15 did not refer to permanent incapacity. However, the courts have found that a requirement for permanence may be implied¹; that is, a requirement for the incapacity to be likely to last at least until normal retirement age. It might have been preferable for the medical panel to stick to the wording of rule 15, to avoid confusion, but the adjudicator did not think the wording used indicated that the panel had interpreted the rule incorrectly.

- Again, the Scheme factsheet did not mirror the wording of rule 15. However, in the adjudicator's view, it gave a useful indication to members as to what test would be applied in deciding whether the incapacity criteria were met. She did not think the Scheme literature could be said to be misleading. The function of such literature was to explain the benefits of the Scheme to members in accessible language without straying too far from the actual wording of the rules. In the adjudicator's view, the factsheet fulfilled this function appropriately.
- The adjudicator noted that USS Ltd considered the appeals process to be voluntary and, above and beyond the statutory requirements. It is true that there is no statutory requirement to have a separate appeals process in place for incapacity retirement. Many pension schemes dealt with such cases under their IDR procedure. Regardless of which model was chosen, a member had the right to appeal/challenge a decision relating to entitlement to benefits. The fact that a case related to incapacity retirement did not alter this. If USS Ltd chose to operate a separate appeals process for its incapacity retirement cases, it must ensure that the process was fit for purpose and afforded the member the same opportunities as an IDR procedure.
- Mrs Y had expressed the view that having the two processes was confusing. The adjudicator said she had not identified any point at which Mrs Y's case was unduly delayed as a result of any such confusion, either on her part, or on the part of her employer.
- In order to put matters right, the adjudicator suggested USS Ltd should review its decision to pay Mrs Y Total Incapacity retirement benefits from 25 April 2017, rather than the date of her retirement. In the event that USS Ltd came to the conclusion that Mrs Y did meet the Total Incapacity criteria in November 2016, it should pay her arrears of pension and lump sum, together with simple interest at the rate quoted for the time being by the reference banks. In the event that USS Ltd came to the conclusion that 25 April 2017 is the appropriate date for payment of the Total Incapacity retirement benefits, it should explain to Mrs Y why this should be. In particular, it should explain why it considered her condition to have changed in the interim period such that she only met the eligibility criteria from that date.

¹ *Harris v Shuttleworth* [1994] PLR 47

- The adjudicator was also of the view that USS Ltd should pay Mrs Y £500 for the significant distress and inconvenience she will have experienced as a result of its failure to consider her appeal in an appropriate manner.

35. USS Ltd did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. USS Ltd provided its 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 USS Ltd for completeness.

Ombudsman's decision

36. Under rule 15, a member must satisfy five conditions in order to be eligible for incapacity benefits. The first of these, service, is not in dispute nor is the fifth, application. I will, therefore, focus on the remaining three:-

- Employer's agreement – the employer is of the opinion that the member is suffering from Incapacity at the date of the relevant cessation of eligible employment.
- USS Ltd agreement to incapacity type – USS Ltd determine the member is suffering from Incapacity and, if so, whether it is Total or Partial Incapacity.
- Reason for retirement – USS Ltd determine that the member has retired or ceased employment on the grounds of Total or Partial Incapacity.

37. I note that, in contrast to the previous set of Scheme rules, rule 15 now calls for both the employer and USS Ltd to consider whether the member is suffering from Incapacity. Previously, USS Ltd had been required only to consider whether the Incapacity was Partial or Total..

38. Under the 2016 Rules, initially the employer decides whether the member is suffering from Incapacity, "at the date of the relevant cessation of eligible employment" (rule 15.1.2).

39. USS Ltd then determines whether it also finds that the member is suffering from Incapacity and, if so, whether it is Total or Partial Incapacity. Rule 15.1.3 does not specify the date at which this assessment is to be made. It would, however, be somewhat odd if USS Ltd was to assess the member's health at a different date to that required of the employer in respect of the same benefit.

40. USS Ltd is also called upon to determine whether or not the member has retired, or ceased employment, on the grounds of Total or Partial Incapacity (rule 15.1.4). This again suggests that the assessment must be as at the date of cessation of employment.

41. All of the above actions are findings of fact: either the member is suffering from Incapacity or they are not; either the Incapacity is Total or it is Partial; and either the member has retired or ceased employment, or they have not.

42. I agree that Incapacity benefits cannot be paid unless and until USS Ltd has made its determinations under sub-rules 15.1.3 and 15.1.4. I do not find that this means that the determinations, themselves, become the qualifying criteria for the receipt of benefits. USS Ltd was required to make a finding of fact as to whether Mrs Y met the eligibility criteria at the relevant time. It could not decline to make such a determination or make a determination which was contrary to the facts of her case. There is no element of discretion provided for USS Ltd in rule 15.1. All of which argues against the determinations, themselves, being the eligibility criteria.
43. It is suggested that the legal question is not what state of health Mrs Y was in at retirement but whether USS Ltd's determination on her medical condition was sound. I find this attempt to separate Mrs Y's state of health from the determination of her eligibility for benefit to be contrived. It is not possible to decide whether or not USS Ltd made a sound determination without considering Mrs Y's state of health at the relevant time.
44. Rule 15.2 provides that a member "who retires or ceases an eligible employment on the grounds of partial incapacity or total incapacity **shall be entitled from the day after such retirement or cessation of eligible employment**" (my emphasis) to non-enhanced benefits. Rule 15.3 provides that a member "who retires or ceases employment on the grounds of total incapacity, **shall be entitled from the day after such retirement**" (my emphasis) to enhanced benefits. Once USS Ltd has made a finding of fact as to whether the member has retired or ceased employment on the grounds of Total or Partial Incapacity, that member is entitled to the benefits from the day after retirement or cessation of employment; not from the date of the determination.
45. USS Ltd cannot, of course, determine whether or not the member has retired or ceased employment on the grounds of Total or Partial Incapacity without determining whether or not they are suffering from Total or Partial Incapacity. That determination then feeds into the determination it must make under rule 15.1.4 and, once that is made, into rules 15.2 and 15.3, as appropriate.
46. Rule 15.8 provides for a retrospective determination by USS Ltd. This calls for USS Ltd to determine whether or not the member is, "and was on last ceasing to be in that eligible employment", suffering from Incapacity. If it does so, it may, after consulting with the employer, decide that the member shall receive benefits under rule 15 from the date of cessation of employment. This is a discretionary power which USS Ltd may exercise. However, I do not find that it applies in Mrs Y's case.
47. Rule 15.8 applies when the member has ceased to be in employment before USS Ltd has made a determination about Incapacity. In Mrs Y's case, USS Ltd had already determined she was suffering from Partial Incapacity prior to the cessation of her employment. In my view, the purpose of rule 15.8 is to provide for those cases where a member ceases employment ostensibly for some other reason and it later becomes apparent that Incapacity retirement would have been appropriate.

48. Mrs Y did not agree with USS Ltd's determination that she was suffering from Partial Incapacity as at the date her employment ceased. USS Ltd has since determined that Mrs Y should receive Total Incapacity retirement benefits from 25 April 2017; the date of Dr Oliver's report. It has done so on the grounds that this was the report which enabled it to make that determination.
49. If indeed it was the case that Mrs Y's revised benefits should be paid from the date of the evidence which enabled USS Ltd to make the required determination, it is a moot point as to whether this was Dr Oliver's report. Arguably, since Dr Oliver's report relied upon the evidence from Drs Walker and Dorman, it was this evidence which enabled USS Ltd to make its determination. This serves to illustrate how arbitrary the process becomes when the date of payment is tied to the date of a doctor's report.
50. This brings me to the question of appeal.
51. It is suggested that the appeal process, provided for under rule 15.1.6, is not a mechanism to dispute or criticise the original determination. Rule 15.1.6 states a member has the right to make one appeal "against the determination" made by USS Ltd. In other words, it is a mechanism by which the member can raise their disagreement with the original determination. Put simply, a member disagrees with the determination made by USS Ltd and rule 15.1.6 allows them to appeal against that determination. This would require USS Ltd to revisit and review either, or possibly both, of the determinations it has made under rules 15.1.3 and 15.1.4.
52. I do not agree that this opens up the possibility of indefinite review. Rule 15.1.6 provides for one appeal. USS Ltd may be concerned that rule 15.1.6 could then be used to appeal its appeal decision and, thus, the case ends up in an indefinite loop. Even if that were the case, and I do not find that it is, this is not a reason to limit the member's access to an appeal in respect of the original decision. In any event, I consider the risk of endless review can be minimised by directing the member to the IDR procedure after one rule 15.1.6 appeal.
53. It is suggested that the only way for Mrs Y to re-open or question the basis of the benefits provided when she retired was for her to raise a complaint under the IDR procedure. It is argued that it is this procedure which allows for the determination by USS Ltd to be considered in terms of the evidence which was obtained and taken into account, the requirements of the Scheme rules, and the actual decision.
54. Mrs Y could, and subsequently did, use the IDR procedure to raise her disagreement with the original decision. However, for the reasons given above, I do not find that she was precluded from raising her disagreement with the original determination under rule 15.1.6. The fact that the Incapacity retirement factsheet, erroneously in my view, informed members that a successful appeal would not mean that benefits would be paid retrospectively does not alter this.
55. Mrs Y's position was that the determination by USS Ltd that, as at the date her employment ceased, she was suffering from Partial Incapacity was incorrect. The

question for USS Ltd was, therefore, was Mrs Y suffering from Total Incapacity as at the date her employment ceased. This, as I have said, was a finding of fact required under rules 15.1.3 and 15.1.4. It has failed to address this question and, in so doing, failed to address Mrs Y's appeal in a proper manner.

56. USS Ltd should have reviewed its original determination of Partial Incapacity in terms of the evidence which had been obtained and taken into account, and the requirements of the Scheme rules.
57. It is argued that, if the original determination is robust, it should not be challenged because Mrs Y has produced new evidence which supports her position that she was suffering from Total Incapacity at the relevant time.
58. When a decision concerning entitlement to benefits falls to be reviewed, there is no reason why the appellant should be precluded from submitting additional evidence. Equally, there is nothing to preclude USS Ltd from seeking further evidence or advice. Indeed, this approach is to be encouraged when there is any doubt as to the validity of a decision. However, the evidence must relate to the member's health at the relevant time. In addition, a decision can only be assessed by reference to evidence which could or should have been obtained at the time it was made. In other words, Mrs Y would not be able to challenge a determination on the basis of a retrospective assessment of her state of health when her employment ceased; for example, on the basis of a new diagnosis which was not known at the time. However, I do not believe that this is what Mrs Y sought to do.
59. When obtaining additional advice, USS Ltd should have asked the doctors to give the opinions they would have given had they been asked in November 2016; that is, the date at which Mrs Y's employment ceased. The reports from Drs Walker, Dorman and Oliver, do not indicate that this is what they were asked to do. Given the short elapse of time between Mrs Y ceasing employment and the reports in question, it is very probable that the doctors would have come to the same or similar conclusions. However, to be on the safe side, it would be appropriate for confirmation of this to be sought from them.
60. If the evidence indicates that Mrs Y was suffering from Total Incapacity as at the date her employment ceased, she is entitled to enhanced benefits under rule 15.3. USS Ltd cannot decline to make the required determination under rule 15.1.3 in defiance of that evidence.
61. I do not agree that the termination of Mrs Y's employment before her appeal had been concluded meant she had to be treated as a pensioner member. Mrs Y was an active member when she initiated the appeal and her appeal concerned the payment of benefits under rule 15.1. There is nothing in the Scheme rules which precludes a member from taking benefits prior to the conclusion of an appeal or which alters the status of that appeal if they do so. It would be inherently unfair if this was the case. A member could find themselves in the position of either accepting a determination they felt to be wrong or going without income for an extended period while waiting for an

appeal to be heard. Indeed, on that basis, Mrs Y could still have been waiting to receive her benefits whilst her complaint to me was investigated.

62. Therefore, I uphold Mrs Y's complaint.

Directions

63. Within 21 days of the date of this determination, USS Ltd shall seek clarification from Drs Walker, Dorman and Oliver, as to their opinions in November 2016.
64. On receipt of the further advice, USS Ltd shall, within a further 21 days, review its decision to pay Mrs Y Total Incapacity retirement benefits from 25 April 2017, rather than the date of her retirement.
65. In the event that USS Ltd comes to the conclusion that Mrs Y did meet the Total Incapacity criteria in November 2016, it shall pay her arrears of pension and lump sum, together with simple interest at the rate quoted for the time being by the reference banks.
66. In the event that USS Ltd comes to the conclusion that 25 April 2017 is the appropriate date for payment of the Total Incapacity retirement benefits, it shall explain to Mrs Y why this should be. In particular, it should explain why it considers her condition to have changed in the interim period such that she only met the eligibility criteria from that date.
67. USS Ltd shall pay Mrs Y £500 for the significant distress and inconvenience she has experienced as a result of its failure to consider her appeal in an appropriate manner.

Anthony Arter

Pensions Ombudsman
27 March 2018

Appendix A

USS Rules effective from 1 April 2016

68. Rule 15 provides payment of an early pension on Incapacity if (amongst other things) the employer agrees the member is suffering from “Incapacity” at the date employment ceases and USS Ltd determines that the member is suffering from “Total Incapacity” or “Partial Incapacity”. “Incapacity” is defined as either Partial Incapacity or Total Incapacity.

69. “Partial incapacity” is defined as:

“ill-health of, or injury to, a member or former member, not amounting to total incapacity, which causes that individual to be able for the long term to discharge the duties of neither:

(a) an eligible employment currently held by that individual or held immediately before last ceasing to be an eligible employee;

nor

(b) any other employment (whether or not available) which has a scope and a nature similar to that in (a).”

70. “Total incapacity” is defined as:

“ill-health of, or injury to, a member or former member which causes that individual to be able for the long term to discharge the duties of neither:

(a) the employment currently held by the member as an eligible employee or which was held by the individual immediately before last ceasing to be an eligible employee; nor

(b) any other employment for which an employer would be likely to pay the individual more than a small fraction of the amount which would but for the cessation of eligible employment have been that individual's salary.”

71. Rule 15.1 provides:

“Application of this rule

This rule applies to a member who satisfies all of the following conditions:

15.1.1 Service

The member has either:

(a) completed 2 years' active membership;

(b) completed 2 consecutive years in aggregate of active membership and membership of any comparable scheme in the

continuous employment throughout of one or more institutions and during which there has been no material break; or

- (c) been a member of a comparable scheme after 10 December 1999 by virtue of incapacity qualifying employment and would have been entitled, on retirement on the date of ceasing eligible employment while satisfying the ill health, infirmity or incapacity requirements under that scheme, to an immediate early pension under that scheme, without actuarial reduction.

15.1.2 Employer agrees incapacity

In the employer's opinion the member is suffering from incapacity at the date of the relevant cessation of eligible employment.

15.1.3 Trustee company agrees incapacity type

The trustee company determines that the member is suffering from incapacity and, if the trustee company makes that determination, the trustee company determines whether the member is suffering from total incapacity or partial incapacity. If the trustee company determines that the member is not suffering from incapacity, sub-rule 15.1.6 shall apply but no other provision of this rule 15 shall apply, except to such extent as may be determined through the appeals procedure there mentioned.

15.1.4 Reason for retirement or cessation of eligible employment

The trustee company determines that the member has retired or ceased one or more eligible employments on the grounds of total incapacity or partial incapacity before normal pension age and, in a case of total incapacity, without continuing in any other eligible employment.

15.1.5 Application to the trustee company

The member applies to the trustee company, in a form acceptable to the trustee company, for benefits under this rule, unless the trustee company determines that regulation 8(3) of the Preservation Regulations is satisfied.

15.1.6 Incapacity appeals procedure

The member has the right to make one appeal (and no further appeal) against the determination made by the trustee company under sub-rule 15.1.3, using the procedure adopted from time to time by the trustee company.”

72. Rule 15.2 provides:

Non-enhanced incapacity benefits

A member who retires or ceases an eligible employment on the grounds of partial incapacity or total incapacity shall be entitled from the day after such retirement or cessation of eligible employment to ...”

73. Rule 15.3 provides:

“Enhanced incapacity benefits

15.3.1 ... a member, ... who retires or ceases eligible employment on the grounds of total incapacity, shall be entitled from the day after such retirement to ...”

74. Rule 15.8 provides:

“Retrospective determination

Where a member has ceased to be in eligible employment before the trustee company has determined that the member is, and was on last ceasing to be in that eligible employment, suffering from incapacity, and the member has retired or ceased that eligible employment on the grounds of incapacity, the trustee company may, after consulting with the employer, decide that the member shall benefit under this rule 15 from the date of cessation of eligible employment. Any amount that has as a result of that cessation of eligible employment been paid to the former member shall be deducted from the benefits payable to that individual under this rule.”

75. Rule 15.11 provides:

“Later finding of total incapacity

15.11.1 If the trustee company determines that a pensioner member, who has not attained normal pension age and is in receipt of a non-enhanced Incapacity pension, is suffering from total incapacity and not partial incapacity, the trustee company may pay an enhanced incapacity pension at the level at which it would have been payable had the pensioner member retired on the grounds of total incapacity when this rule 15 first applied to that pensioner member.

15.11.2 The trustee company may further increase the enhanced incapacity pension by an amount which the trustee company determines on actuarial advice to be equivalent to the enhanced incapacity lump sum which would have been payable if the pensioner member had retired on the grounds of total incapacity when this rule 15 first applied to that pensioner member.”

76. The rules are available at:

<https://www.uss.co.uk/members/members-home/resources/annual-reports-and-scheme-rules>

Appendix B

Medical evidence

Dr Linsley (consultant psychiatrist), 16 March 2016

77. Dr Linsley said Mrs Y had developed Chronic Fatigue (**CFS/ME**) over two years previously. He said she had symptoms of poor concentration, memory, recurrent sore throats, swollen glands and post exertional fatigue. Dr Linsley also mentioned that Mrs Y had hypothyroid disease and was on medication for this. He mentioned she was on medication for severe migraine. Dr Linsley said Mrs Y had developed depression approximately six months after her CFS/ME began. He said he had recently increased her medication but this had had the side effect of increasing her gastro-intestinal symptoms. He said he was considering changing Mrs Y's anti-depressant but was consulting with her neurologist to see if there was any contraindication.
78. Dr Linsley said Mrs Y was able to walk for approximately five minutes and could manage steps slowly. He said she was unable to undertake many domestic tasks. He said Mrs Y had had a full range of blood tests and had been fully investigated. He went on to say:

"At this stage I would have to be somewhat guarded about the precise estimation of prognosis. I would very much like to think, and having discussed this with her, that her depression should be regarded as potentially treatable but naturally is more difficult in the context of the side effects being more common in people with CFS/ME.

She is in the early phases of treatment ... for fatigue. As yet there has been no improvement but will have a more accurate picture of this after 8-12 sessions. It would be a little premature for me to be able to give any specific advice on reasonable adjustments that could be undertaken in the workplace as I think we need to see a little improvement before a return to work can be envisaged.

In general however any return to work should consider the range of limiting the mental as well as the physical activities undertaken within that post. There should be capacity to have frequent, short, rest breaks which normally require access to a quiet area. A particular problem we frequently encounter is that the journey to work can often be tiring and thought may be given to home based work for some employees, although I cannot say if this is appropriate at this stage for this lady."

Dr Linsley, 24 May 2016

79. Dr Linsley referred to his previous letter in March 2016. He said Mrs Y had since had five telephone consultations with a specialist physiotherapist. He said Mrs Y had not had any face to face consultations because of the difficulty in her leaving her house. Dr Linsley went on to say:

“It appears the daily “baseline” activity she is able to manage is limited to 20 steps. That is, over this level she would experience excessive fatigue which persists the next day. In addition she has dizziness and [is] under Neurology regarding this and migraine. The dizziness is an experience of spinning which is over and above the postural light-headedness we normally see in CFS/Me. This, unfortunately, has complicated graded exercise treatment and further limits the amount of activity she can undertake. I am unable to comment on treatments for the dizziness.

At present, from reading the clinical entries, it appears difficult to see how she will successfully progress with the treatment of CFS/Me. This may change if her other conditions significantly improve.”

ME5 completed by Dr Pickering, 4 June 2016

“High levels of fatigue + poor concentration have made it impossible for her to function effectively as an administrator. She struggles to cope with ordinary day to day activities and requires help with shopping, housework, etc.”

“The nature of the work limits the application of these adjustments. Home working is not an option. A return to work on limited hours (half days) and limited work intensity was attempted in November 2015, but she found she was unable to cope even at this very reduced level.”

“Her fatigue, loss of memory + poor concentration stopped her from returning to work since July. My assessment is that there is no way she could cope with her work with its intensive mental demands.”

“She has had the problem for at least two years and has shown no significant improvement over the last six months. I note her consultant says ‘it is difficult to see how she will successfully progress with treatment’. It is difficult to foresee a long way into the future but it is clear that she will not work in the foreseeable future.”

Dr Kennedy (consultant neurologist), 15 August 2016

80. Dr Kennedy said Mrs Y had been under her care for chronic vertiginous migraine, which she had experienced since early 2013. She said Mrs Y had tried multiple medications and was now receiving botulinum toxin treatment, which had improved some of the symptoms. She said Mrs Y remained on a chronic migraine pattern. Dr Kennedy then referred to the criteria for full ill health retirement. She described this as being “unfit to work with no further treatment options that would guarantee a return to work prior to retirement age”. She said Partial Incapacity meant no treatment was available which would enable Mrs Y to return to work in the foreseeable future and, if she were to return to work, it would be in a lower capacity.

81. Dr Kennedy concluded:

“Although chronic migraine is a significantly disabling condition which has great socio-economic impact due to reduced ability to work I would not be able to say it was a permanent change as the inherent nature of the condition is variable. However, [Mrs Y] will always carry the inherited predisposition to migraine over her lifetime.

[Mrs Y] has already tried all available licensed treatments for chronic migraine and there is no other treatment that would be able to guarantee her ability to work again, and if it was the case that she did work again it would likely be in a lower capacity, if at all.

It must be stressed that the World Health Authority does recognise chronic migraine as a severely disabling condition which has significant impact on the ability to work ...”

Dr Linsley, 7 September 2016

82. Dr Linsley said Mrs Y continued to have treatment with the specialist physiotherapist. He said her condition appeared to be deteriorating with increased widespread pain, fatigue and sleep disturbance. He said he was in receipt of a letter from Mrs Y’s neurologist detailing her problems with migraine and vertigo. Dr Linsley said the neurologist was better placed to provide information about these conditions, but he noted that recent treatments had not improved Mrs Y’s condition. He said it was increasingly difficult to see any realistic or significant improvement in Mrs Y’s CFS/ME.

Dr Walker (consultant rheumatologist), 27 January 2017

83. Dr Walker said Mrs Y had diagnosable fibromyalgia, which might possibly have been precipitated by her migraine and vertigo. He said the prognosis was variable and treatment was not very effective. He noted Mrs Y had been receiving graded exercise for her CFS and was on medication for depression. He suggested trying a different antidepressant. Dr Walker concluded:

“For the reasons above it is difficult to be certain of a prognosis for [Mrs Y]. She had had progressive pain and fatigue building over two and a half years and not so far responded to any treatment. She has on-going problems with migraine which will be tending to push her back into fibromyalgia and I believe the balance of probabilities are that she is likely to have on-going symptoms for the foreseeable future and for at least the next five years ...”

Dr Dorman (consultant neurologist), 21 March 2017

84. Dr Dorman confirmed that he had been provided with copies of the reports from Drs Walker, Kennedy and Linsley.

85. Dr Dorman described Mrs Y's migraine and vertigo symptoms in detail. He noted she had been suffering from fatigue since 2013 and had been diagnosed with CFS in 2015. He also noted she had been suffering discomfort in her limbs and body for the previous three years and the possible label of fibromyalgia had been raised. Dr Dorman agreed that Mrs Y's headache problem would fit the criteria for chronic migraine. He noted she had been treated with Botox injections but the benefit had waned. He noted Mrs Y had been using analgesics very frequently over the last three years. Dr Dorman said he was concerned that Mrs Y may be suffering co-morbid analgesic overuse headache in addition to her chronic migraine. He said this could be successfully treated.
86. Dr Dorman said there were two evidence based treatments for chronic migraine which Mrs Y had tried without success. He said there were other drug treatments which could be used but these were without robust supporting evidence from randomised controlled trials. He noted that analgesic withdrawal had not been tried and recommended that it was considered.
87. Dr Dorman said, given the severe co-morbid problems Mrs Y had reported, he was not surprised that she had not been able to continue to manage her duties. He said the prognosis for migraine was variable. He referred to a study which had shown that around 25% of patients would remit to episodic migraine over a period of two years. Dr Dorman expressed the view that Mrs Y would remain disabled from chronic migraine over the following two years. He said the long term prognosis was more difficult to predict. He thought Mrs Y's condition could remit spontaneously; particularly if external stressors were removed. He also referred to new treatment which was in late stage clinical trials which appeared to be likely to prove effective.
88. Dr Dorman concluded:
- "With respect to functional capacity in relation to the occupation of student case work administrator, my view is that in the short term (two years or less) [Mrs Y] would be unable to manage this. However, in my opinion and on the balance of probability, she may not remain incapable of discharging these duties for the next thirteen years. She may also have the capacity to manage a lower level (less demanding) appointment."

Dr Oliver (consultant and accredited specialist in occupational medicine), 25 April 2017

89. At the beginning of his report, Dr Oliver listed the medical evidence he had been provided with. This included the medical reports summarised above. He had also been provided with a copy of Mrs Y's job description. He then summarised the various medical reports.
90. Dr Oliver said Mrs Y's case was complex with a number of co-morbidities which seemed to impact on each other. He concluded:

“[Mrs Y’s] former substantive role ... was office based but involved coordination and management of student complaints, disciplinary matters and appeals together with annual review and production of University regulations and policies for students. It has already been accepted by the medical panel that on balance [Mrs Y’s] medical concerns will prevent her from returning to the demands of her substantive job role.

Given the lack of improvement with recognised treatments for both her chronic migraine, with vertigo, over 2-3 years and chronic fatigue with associated fibromyalgia over the past 12-18 months, and the reported level of functional impairment to date, it appears increasingly unlikely that [Mrs Y] will undertake gainful employment in the foreseeable future. On balance of probabilities she therefore fulfils the criteria for Total Incapacity retirement.”