

Ombudsman's Determination

Applicant	The Estate of the late Mrs E
Scheme	NHS Pension Scheme
Respondent	NHS Pensions

Outcome

1. The Estate's complaint is upheld and to put matters right NHS Pensions shall decide whether or not Mrs E satisfied the tier 1 or tier 2 condition as at the date her employment with Abertawe Bro Morgannwg University Health Board (**ABMU**) ended.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. The complaint against NHS Pensions is that it has refused to pay a commuted ill health retirement benefit to the Estate of the late Mrs E.

Background information, including submissions from the parties

4. Mrs E is a 1995 section member of the Scheme. Relevant regulations from 'The National Health Service Pension Scheme Regulations 1995' are provided in the Appendix.
5. During a period of sickness absence Mrs E was diagnosed with a terminal illness.
6. In May 2016 ABMU contacted the pensions department of NHS Wales Shared Services Partnership (**NWSSP**) for an urgent ill health estimate. This was provided on 12 May 2016, detailing benefits payable in the circumstances of ill health retirement, commuted ill health (where life expectancy was less than 12 months) and death in service.
7. At this time forms: AW33E (ill health retirement), AW341 (commuted ill health benefits), and AW8 (application for retirement benefits), were issued.
8. Mrs E opted for commuted ill health benefits. She completed the relevant forms on 1 July 2016.
9. NWSSP received forms AW341 and AW8 on 7 July 2016.

10. Form AW33E was sent to ABMU's OH department to complete part C and then forward to NHS Pension. In error the OH department filed the form.
11. Mrs E's employment with ABMU ended on 13 July 2016 on the grounds of ill health/incapacity.
12. Sadly, Mrs E died on 23 August 2016. NWSSP was notified on 26 October 2016. The next day it contacted NHS Pensions to ask if it had received form AW33E and was informed it had not.
13. The OH department's error was then discovered. The OH department subsequently completed part C of form AW33E on 2 November 2016. NHS Pensions received the form two days later.
14. On 23 November NHS Pensions informed ABMU that there would be no consideration for ill health retirement.
15. NHS Pensions says:
 - The purpose of the AW33E is for consideration of entitlement to ill health retirement benefits. There is no right to benefits until the requirements of the regulations (the tier 1 or tier 2 condition) have been met, the member's employment has been terminated because of ill health and a Retirement benefits claim form (AW8) has been properly completed.
 - It cannot pay benefits to which there is no entitlement. Mrs E cannot be considered for ill health retirement benefits as the AW33E was not properly completed or submitted to it until after her death.
16. As Mrs E died as a preserved member within 12 months of leaving the Scheme benefits are payable in accordance with regulation F3.

Adjudicator's Opinion

17. The Estate's complaint was considered by one of our Adjudicators who concluded that further action was required by NHS Pensions. The Adjudicator's findings are summarised briefly below:-
 - Mrs E's employment with ABMU ended on grounds of incapacity due to ill health. Prior to then she had received a quotation for ill health retirement, had had discussions with AMBU about the quoted options and had completed forms AW33E, AW341 and AW8.
 - By completing the forms Mrs E made her claim for ill health retirement, fulfilling the requirement of regulation T1(1). She had retired under regulation E2(A).

- The fact that AMBU's OH department failed to timely complete and pass on form AW33E to NHS Pensions is not sufficient for NHS Pensions to decline the application.
 - If Mrs E had not died NHS Pensions would have carried out the process of determining her eligibility as at the date her employment ended and, if appropriate, would have paid backdated benefits. There is no reason why Mrs E's death should change this.
 - NHS Pensions has proceeded on the basis that Mrs E became a deferred (preserved) member as at the date her employment with AMBU ceased, but this would only be the case if she had not qualified for ill health retirement.
18. NHS Pensions did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHS Pensions 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 NHS Pensions for completeness.

Ombudsman's decision

19. NHS Pensions says:-

- Mrs E had not retired under regulation E2(A) as she had never applied to the Secretary of State for her application to be considered. No entitlement under regulation E2A had been established when she completed forms AW8 and AW341.
 - It cannot consider Mrs E for ill health retirement as she is a deceased member.
 - It must process her case as a deferred member of the Scheme.
 - To direct it to consider whether Mrs E qualified for ill health retirement at the date her employment ended is a misinterpretation of the Scheme regulations and would direct it to breach those regulations.
20. I agree with the Adjudicator that by completing forms AW33E, AW341 and AW8 Mrs E had made her claim for ill health retirement, fulfilling the requirement of regulation T1(1). Effectively she had retired under regulation E2(A).
21. Therefore, NHS Pensions should not have proceeded on the basis that Mrs E was a deferred member at the date her employment ended. That would only apply if NHS Pensions had firstly made a proper decision that she did not qualify for ill health retirement at that date, which it did not do.
22. Therefore, I uphold the Estate's complaint.

Directions

23. NHS Pensions shall decide, within 14 days of obtaining the opinion of its medical advisers, whether Mrs E qualified for ill health retirement at the date her employment with AMBU ended and, if so, whether on that same date she satisfied the criterion to take her benefits as a commuted lump sum on grounds of serious ill health. It should notify the Estate of its decision with reasons.

Anthony Arter

Pensions Ombudsman
6 March 2018

Appendix

E2A, 'Ill health pension on early retirement'

24. As relevant regulation E2A says:

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

(a) retires from pensionable employment on or after 1st April 2008;

(b) did not submit Form AW33E (or such other form as the Secretary of State accepted) together with supporting medical evidence if not included in the form pursuant to regulation E2 which was received by the Secretary of State before 1st April 2008, and

(c) is not in receipt of a pension under regulation E2.

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

(a) the member has at least 2 years qualifying service or qualifies for a pension under regulation E1; and

(b) the member's employment is terminated because of physical or mental infirmity as a result of which the member is-

(i) permanently incapable of efficiently discharging the duties of that employment (the "tier 1 condition"); or

(ii) permanently incapable of regular employment of like duration (the "tier 2 condition") in addition to meeting the tier 1 condition

(3) Subject to paragraph (4), the pension to which a member is entitled-

(a) upon satisfaction of the tier 1 condition ("the tier 1 pension"), or

(b) upon satisfaction of the tier 2 condition in addition to meeting the tier 1 condition ("the tier 2 pension"), will be calculated as described in regulation E1."

F3, 'Member dies with preserved pension'

25. Regulation F3 says:

“(1) If a member leaves pensionable employment with a preserved pension under regulation L1 and dies before his pension under this Section of the scheme becomes payable, a lump sum on death shall be payable in accordance with regulation F5.

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(2) The lump sum will be equal to 3 times the yearly rate of the member's preserved pension, calculated as described in regulation L1."

T1, 'Claims for benefits'

26. As relevant regulation T1 says:

"(1) A person claiming to be entitled to benefits under these Regulations ("the claimant") shall make a claim in writing to the Secretary of State in such form as the Secretary of State may from time to time require.