

**PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN**

Applicant	Mrs Catherine Wallace
Scheme	NHS Superannuation Scheme (Scotland) (the Scheme)
Respondent	Scottish Public Pensions Agency (SPPA)

Subject

Mrs Wallace's complaint is that she has been wrongly refused upper tier ill health retirement.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against SPPA as they reached their decision in a proper manner after due consideration of the medical opinion provided.

DETAILED DETERMINATION

The National Health Service Pension Scheme (Scotland) Regulations 2011

1. See below 'Appendix'.

Material Facts

2. SPPA administers the Scheme on behalf of the Scottish Ministers.
3. Mrs Wallace was employed as a part-time midwife by NHS Dumfries & Galloway. She had a road traffic accident in 2008 and was initially diagnosed as suffering a whiplash type injury. In 2009 she unsuccessfully applied for ill health retirement. She remained absent from work and in September 2010 Dr McMahon (consultant rheumatologist) diagnosed fibromyalgia.
4. In December 2010, Dr Jamieson (the Director of Occupational Health & Safety Services for NHS Dumfries & Galloway) recommended that consideration be given by management to the termination of Mrs Wallace's employment on grounds of health capability. An employment review occurred in February 2011.
5. In April 2011 Mrs Wallace submitted a new application for ill health retirement. Under medical information (section 'h' of the application form) Dr Jamieson summarised information he considered relevant to Mrs Wallace's long term incapacity for the duties of her NHS employment and any regular employment of like duration. He said:

“The degree of functional disability since the RTA in October 2008 has resulted in a failure to rehabilitate Mrs Wallace into her own post with accommodations. Further attempts to source suitable alternative employment have been unsuccessful. The prognosis for recovery sufficient to remain in current employment within a foreseeable time frame is poor.

Initially it was my opinion that she remained fit for a range of alternative posts of a more sedentary/administrative nature. The onset of fibromyalgia and the failure of amelioration of her symptoms over time leads me to conclude that recovery sufficient to resume her career as a midwife practitioner is unlikely.”
6. On 10 May 2011 NHS Dumfries & Galloway notified Mrs Wallace that her employment was to be terminated on the grounds of health capability – the date of severance was 12 July 2011. Mrs Wallace was then age 44.
7. Later that month SPPA turned down Mrs Wallace's application for ill health retirement. A medical adviser for the Scheme gave his opinion to SPPA that Mrs Wallace did not satisfy the lower tier condition.

“The consultant rheumatologist who assessed [Mrs Wallace] on 22-09-2010 assessed that from this whiplash injury Mrs Wallace developed a localised myofascial type pain syndrome which has subsequently generalised into fibromyalgia. Dr McMahon then outlined some measures to deal with this difficult condition, In his more recent report the GP indicates that Mrs Wallace continues to have significant problems with acute flare ups of the fibromyalgia.

However, it is not clear to what extent the recommendations of Dr McMahon have been used and indeed, to what extent more specialist services for fibromyalgia have been considered. In view of the very long time ahead to age 60 it is not unreasonable to advise that there will be benefits from specialist clinical management and support as well as personal adaptation and perhaps also natural amelioration of the condition, all of which places permanent incapacity for her NHS duties in doubt.

Mrs Wallace is also reported to be depressed and to have a degree of post traumatic stress; the new information from the GP does not outline how it is being clinically managed.

The upper tier condition cannot be met as the lower tier condition has not been met.”

8. SPPA notified Mrs Wallace:

“On the medical evidence available, we are not satisfied that you are permanently incapable of efficiently discharging the duties of your employment with NHS Dumfries and Galloway.”

9. Mrs Wallace invoked the Scheme’s two-stage internal dispute resolution (**IDR**) procedure. Her stage 1 appeal comprised:

- research details on post traumatic fibromyalgia;
- comments made by Dr Jamieson on Mrs Wallace’s condition following his examination of her in March 2011 (parasthesiae of left arm and 4th and 5th fingers, severe pain on extension and flexion of cervical spine, widespread muscle and joint pains with associate fatigue and general malaise and an inability to lift, bend or stretch (“causes considerable functional disability in core duties as a midwife practitioner”) and prolonged standing exacerbating back and pelvic pain);
- her job details as a Midwife (including skills required) with Mrs Wallace’s opinion why she was no longer able to perform the role;
- a letter from Professor Finch (Consultant Rheumatologist) dated 13 October 2011, in which Professor Finch confirmed the previous diagnosis of fibromyalgia and said:

“Part of this condition, in addition to the musculoskeletal aches and pains, is chronic tiredness. This lady had worked as a Midwife 24 hours per week, but I think it highly unlikely that she will be able to return to that job long term. In my opinion, I feel that this will be a permanent condition.”

- A current health report prepared by her GP for a Standard Life claim for Waiver of Premium Benefit in which her GP gave her opinion that Mrs

Wallace had reached a “chronic impasse”, recovery was not expected to allow her to return to her own occupation and it was unlikely “for the foreseeable future” that she would be able to return to work in any occupation “but may be possible if condition surprisingly improves, though this would be unexpected.”

10. Another medical adviser gave their opinion to SPPA that the lower tier condition was not met:

“It is acknowledged that Mrs Wallace has a continuing complaint of a range of interacting musculoskeletal and psychological symptoms and that there has been further specialist opinion stating she suffers from fibromyalgia syndrome.

However it is advised that there is not adequate evidence of specialist clinical management and support, and any involvement of appropriate specialist clinics, resulting from previous treatment recommendation. This was also referred to in the previous advice on the application.

It is again advised therefore that, in the absence of evidence that all reasonable avenues of therapy have been fully explored / exhausted, it is premature to accept a permanent incapacity over the period of time under consideration, - the next 15 years.”

11. SPPA notified Mrs Wallace that her appeal had been unsuccessful as “we are still not satisfied that you are permanently incapable of efficiently discharging the duties of your employment.”
12. Mrs Walker invoked IDR stage 2. Her appeal was made on her behalf by Brian Barr Solicitors. The appeal included a report from Dr Walker (Consultant Rheumatologist) dated 19 June 2012:

- Commenting on treatments Dr Walker said:

“Fibromyalgia was diagnosed by Dr McMahon in September 2010 and she has been tried on Amitriptyline, Gabapentin, Duloxetine, tried a TENS machine, osteopaths, etc., none of which has produced any sustained benefit. She is currently only taking Co-codamol.”

- Commenting on Mrs Wallace’s current state Dr Walker said:

"Her current state is that she has pain right across her neck and down her shoulders into her arms and hands. She has low back pain spreading across to her thighs. She has marked sleep disturbance and although she is in bed for eight hours she wakes unrefreshed and fatigue is a major feature. She also has developed irritable bowel syndrome. By her own estimates she can stand for only about five minutes in reasonable comfort, sit for about ten minutes, and walk for a quarter of a mile slowly. She also has poor concentration. Apart from being unable to work she is unable to drive more.”

- Giving his opinion on whether Mrs Wallace was fit for work Dr Walker said:

“...it is clear from the record and occupational health records that she was unable to provide regular service as a Midwife and indeed her occupation was terminated on that basis...I do not believe that on the balance of probabilities she is capable of working as a Midwife and I believe that this state is permanent. This has been the case since she stopped work in November 2009.

With regard to whether she could work in some other employment, this is more difficult as less physically demanding occupations would be more possible. However, the degree of fatigue and poor concentration and indeed just the issue of getting up, ready and getting to work would be difficult for [Mrs] Wallace and make it unlikely that she would be able to provide [a] reliable service in any occupation. I believe she is not fit for any work and there has been no sign of any improvement in her condition. I believe on the balance of probabilities that she is permanently unfit for any work. I accept that Mrs Wallace has tried all appropriate treatments and that there are no available treatments that on the balance of probabilities would enable her to return to work.”

13. The Director of Policy considered Mrs Wallace’s IDR stage 2 appeal after obtaining the opinion of another medical adviser who gave his opinion that Mrs Wallace only satisfied the lower tier condition:

“...It was confirmed that because of her symptoms of fibromyalgia she has been tried on Amitriptyline, Gabapentin, Duloxetine. She also had TENS machine, osteopathy treatment and other complimentary therapies but none of these interventions produced any substantial benefit. She is currently using mild analgesia.

According to the Consultant Rheumatologist, Dr Walker, she tried all appropriate treatment and there is no available intervention, which on the balance of probabilities, would enable her to return to work. She has ongoing pain across her neck and down her shoulders into her arms and hands. She experiences low back pain spreading across to her thighs and has marked sleep disturbance with fatigue. Her symptoms are adversely affecting her ability to stand, sit, walk, drive more than ten minutes. Her concentration is poor and she has difficulty with heavier housework and heavier shopping.

Considering her symptoms and associated incapacitating effects Mrs Wallace is permanently incapable of her NHS role.

...

It is considered that currently available evidence does not tend to indicate that this applicant is, on the balance of probabilities, permanently incapable of regular employment of like duration...

The long term prognosis for fibromyalgia varies widely but the majority of sufferers do achieve at least some degree of recovery and remission over a

period of 3-5 years post diagnosis. Considering [the] extended period of time to her retirement age and her residual level of function it is expected that she should be able to undertake less physically demanding work of like duration, perhaps with adjustments, prior to normal benefit age.”

14. The Medical Adviser did not recommend reassessment for the upper tier condition within three years on the grounds that Mrs Wallace’s condition was unlikely to significantly change over that period.
15. After reviewing the submitted evidence the Director of Policy determined that Mrs Wallace was eligible to receive lower tier pension benefits.
16. Brian Barr Solicitors asked SPPA to reconsider their decision:

“Our client is surprised and disappointed that you appear to be denying her entitlement to an upper tier pension based on the fact that the “majority of sufferers do achieve some degree of recovery”. The independent medical evidence of Dr Walker makes it clear that Mrs Wallace has tried all appropriate treatments and that, on the balance of probabilities, she is likely to remain permanently incapable of undertaking any work. Our client therefore does not understand why the SPPA have denied her claim for an upper tier pension.”
17. SPPA replied that that if Mrs Wallace remained dissatisfied she could refer the matter to the Pensions Advisory Service (**TPAS**), the Pensions Ombudsman or the Scottish Public Services Ombudsman. Mrs Wallace duly contacted TPAS who wrote to SPPA for an explanation why medical opinions submitted at IDR stage 1 and 2 had not been accepted in full.
18. In respect of Mrs Wallace’s 2011 application the Director of Policy, among other things, said:
 - SPPA had turned down Mrs Wallace’s original application and stage 1 appeal after obtaining independent medical advice that in the absence of adequate evidence that all reasonable avenues of therapy had been explored and exhausted it was premature to accept that Mrs Wallace was permanently incapacitated.
 - Following their receipt of TPAS’ letter they had asked the Medical Adviser at IDR stage 2 to expand on his previous advice. His further comments were:

“My advice that Mrs Wallace is permanently incapable of her NHS role but not for the regular employment of like duration was made based on all available evidence in this case, not only most recent Medico-legal report from the Consultant Rheumatologist , Dr Walker, dated 19/06/2012.

The opinion of the Consultant Rheumatologist, Prof Finch, provided in a letter dated 13/10/2011, was that she will not be able to return to her midwife role long term. This advice was supported by the GP, Dr Lee, whose letter was attached to her first dispute documents. Dr Lee stated that because of her symptoms she is physically incapable of performing any tasks requiring moderate amount of exertion, she would also struggle to come to decisions quickly and that she is unable to return to her previous job as a midwife.

The report from the Consultant Occupational Health Physician, Dr Jamieson, dated 23/11/2009, provided with her initial application was also taken into account. He states that she is permanently unfit for her role as a midwifery practitioner but is fit for [a] range of alternative roles of more sedentary/administrative nature.

It is acknowledged that Mrs Wallace reports, in her letter dated 07/11/2011, that her health has declined since 2009, however there is no medical evidence provided to support this statement.

The Consultant Rheumatologist Dr Walker, in his report dated 19/06/2012 confirms that during the period of few weeks to months after her road traffic accident, in February 2008, she developed all the symptoms and signs of fibromyalgia (with fatigue and widespread pain). Her symptoms according to Dr Walker have never improved and the therapeutic interventions have not produced any sustained benefit but he does not confirm any substantial deterioration of her condition. This indicates that her symptoms and associated functional restrictions/capabilities have been static.

Dr Walker confirms that Mrs Wallace is unable to provide regular service as a midwife and on the balance of probabilities is permanently incapable of this role. This opinion is consistent with other specialists' recommendations in this case.

It is noted that in Dr Walker's opinion it is more difficult to answer the question whether she could work in some other employment, as less physically demanding occupations would be more possible. This may suggest a degree of uncertainty when providing this additional advice. He then states that her fatigue, poor concentration and the issue of getting up, ready and getting to work would be difficult for her and make it unlikely that she would be able to provide reliable service in any occupation. However in his report he does not identify any difficulties with getting ready (washing or dressing). The statement that she is unable to drive more than about 10 minutes is noted. This may indicate that she is able to cope with shorter journeys, locally for example when travelling to work) although this has not been directly confirmed. It is also unclear if Dr Walker considered the aspect of workplace adjustments (including working flexible hours and support from the Access to Work that could accommodate her symptoms and restrictions) and the criterion of regular employment of like duration which need to be taken into account when advising Ill Health Retirement. The overall justification provided by Dr Walker is considered to be insufficient to support the opinion of incapacity for regular employment of like duration.

The advice that the lower tier condition is accepted only remains in my opinion appropriate in this case as reflects the all available evidence provided."

19. TPAS notified Mrs Wallace of her legal right to approach this office.

Summary of Mrs Wallace's position

20. Mrs Wallace says that SPPA have cherry picked from Dr Walker's report to deny her upper tier pension benefits.
21. She considers it perverse that SPPA ignored the evidence of Dr Jamieson, her own GP and Dr Walker and that they were biased in only accepting the evidence of the Scheme's Medical Advisers.
22. She considers that the medical advice sought by SPPA is not independent as the Scheme's Medical Advisers (Atos Healthcare) also conduct assessments for the Department of Work and Pensions and refers to SPPA'S circular (No. 2010/8). This advised from 1 November 2010 that Atos Healthcare had been appointed to consider IDR stage 2 appeals solely on the basis of the medical evidence provided and that face to face examinations would only be conducted in exceptional circumstances – Atos Healthcare also make a recommendation to SPPA on initial applications and IDR stage 1 requests.

Summary of SPPA's position

23. SPPA's position is as per their aforementioned response to TPAS. They deny Mrs Wallace's allegation.

Conclusions

24. To qualify for upper tier benefits a member must be suffering from physical or mental infirmity and be assessed as permanently incapable of efficiently discharging the duties of their employment and any regular employment of like duration. Permanently means to Normal Benefit Age (60).
25. My role in this matter is not to decide whether Mrs Wallace is entitled to upper tier pension benefits. That is a matter for SPPA to decide in consultation with their Medical Advisers.
26. My role is to decide whether SPPA have correctly applied the Scheme's Regulations, considered all relevant information, asked right questions and reached a decision which is not perverse. By perverse, I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.
27. I am satisfied that SPPA have applied the correct Scheme Regulations.

28. Before reaching their IDR stage 2 decision SPPA sought the opinion of another Medical Adviser. They duly accepted the Medical Adviser's opinion that, on the balance of probability, Mrs Wallace satisfied the lower tier but not the upper tier condition and that reassessment for upper tier benefits within three years was not required.
29. Mrs Wallace says SPPA have ignored the evidence of Dr Jamieson and her own GP and ignored/'cherry picked' from Dr Walker's report. I do not think that is right. Dr Walker's report together with all other relevant evidence was considered. It is for SPPA in consultation with their Medical Advisers to attach weight (if any) to the relevant medical evidence.
30. There appears to be no difference of opinion on diagnosis and treatment. But the Medical Adviser, who is an occupational health specialist, is of the opinion that Mrs Wallace is not permanently incapable of work of like duration. Dr Walker is a Consultant Rheumatologist. His specialism is not capacity for employment.
31. The Medical Adviser explained to SPPA what it was in Dr Walker's report that he took a different view on and why. The Medical Adviser appears to have had sufficient information on which to base his opinion and a difference of medical opinion is not sufficient to say that SPPA's decision to accept the Medical Adviser's opinion was flawed.
32. Mrs Wallace has questioned the independence of the Scheme's Medical Advisers. I am satisfied that their recommendations were independent and there was no conflict of interest.
33. I am satisfied that SPPA considered all the relevant evidence and asked right questions, and I do not consider that their decision to award Mrs Wallace lower tier pension benefits was perverse.
34. I therefore do not uphold Mrs Wallace's complaint.

Jane Irvine
Deputy Pensions Ombudsman

23 January 2015

Appendix

The National Health Service Pension Scheme (Scotland) Regulations 2011

- As relevant regulation E3 ('Early retirement pension on ill health grounds (post 1st April 2008)') says:

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

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

...

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

(a) the member-

(i) has at least 2 years qualifying service

...; 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 "lower tier condition"); or

(ii) permanently incapable of any regular employment of like duration (the "upper tier condition") in addition to meeting the lower tier condition.

...

(13) For the purposes of determining whether a member is permanently incapable of efficiently discharging the duties of the member's employment...the Scottish Ministers must have regard to the factors in paragraph (15) and disregard the member's personal preferences for or against engaging in that employment.

(14) For the purposes of determining whether a member is permanently incapable of regular employment...the Scottish Ministers must have regard to the factors in paragraph (16) and disregard the factors in paragraph (17).

(15) The factors to be taken into account for paragraph (13) are-

(a) whether the member has received appropriate medical treatment in respect of the incapacity;

(b) the member's-

(i) mental capacity; and

(ii) physical capacity;

(c) such type and period of rehabilitation which it would be reasonable for the member to undergo in respect of the member's incapacity, irrespective of whether such rehabilitation is undergone; and

(d) any other matter which the Scottish Ministers consider appropriate.

(16) The factors to be taken into account for paragraph (14) are-

(a) whether the member has received appropriate medical treatment in respect of the incapacity;

(b) such reasonable employment as the member would be capable of engaging in if due regard is given to the member's-

(i) mental capacity;

(ii) physical capacity;

(iii) previous training; and

(iv) previous practical, professional and vocational experience, irrespective of whether or not such employment is actually available to the member;

(c) such type and period of rehabilitation which it would be reasonable for the member to undergo in respect of the member's incapacity (irrespective of whether such rehabilitation is undergone) having regard to the member's-

(i) mental capacity; and

(ii) physical capacity;

(d) such type and period of training which it would be reasonable for the member to undergo in respect of the member's incapacity (irrespective of whether such training is undergone) having regard to the member's-

(i) mental capacity;

(ii) physical capacity;

(iii) previous training; and

(iv) previous practical, professional and vocational experience; and

(e) any other matter which the Scottish Ministers consider appropriate.

(17) The factors to be disregarded for paragraph (14) are-

(a) the member's personal preference for or against engaging in any particular employment; and

(b) the geographical location of the member.

(18) For the purpose of this regulation-

"appropriate medical treatment" means such medical treatment as it would be normal to receive in respect of the incapacity...

"permanently" means the period until normal benefit age; and

"regular employment of like duration" means-

... where prior to retiring from employment that is pensionable the member was employed-

(i) on a whole-time basis, regular employment on a whole-time basis; or

(ii) on a part-time basis, regular employment on a part-time basis, having regard to the number of hours, half days and sessions the member worked in that pensionable employment."

- Normal benefit age is 60.
- As relevant regulation 'E4 Re-assessment of ill health condition determined under regulation E3' says:

(1) This regulation applies to a member in receipt of a lower tier pension under regulation E3.

(2) A member to whom this regulation applies may ask the Scottish Ministers to consider whether the member subsequently meets the upper tier condition if-

(a) by notice in writing at the time of award of the pension, the Scottish Ministers informed the member that the member's case may be considered once within a period of three years commencing with the date of that award to determine whether the member satisfies the upper tier condition at the date of such a consideration;
..."