PO-22756

Ombudsman's Determination

Applicant	Mrs N
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondent	Durham County Council (**the Council**)

Outcome

1. I do not uphold Mrs N's complaint and no further action is required by the Council.

Complaint summary

2. Mrs N's complaint concerns the Council's decision to refuse her application for ill health early retirement (**IHER**) as a deferred Scheme member.

Background information, including submissions from the parties

3. On 19 June 2013, Mrs N ceased employment with the Council and was awarded deferred benefits.

4. In March 2014, Mrs N made an application for IHER.

5. On 1 July 2014, Mrs N was referred to Dr Pandy, an independent registered medical practitioner (**IRMP**) who was of the opinion that Mrs N did not meet the criteria of IHER.

6. On 14 August 2014, Mrs N's IHER application was considered at the Council's monthly meetings - "Applications for access to Pension Benefits through ill health retirement or deferred benefits (due to ill health)". The Ill Health Retirement Panel (**the Panel**) held that Mrs N's application did not meet the criteria for IHER.

7. Mrs N raised an appeal under stage one of the Scheme's internal dispute resolution procedure (**IDRP**).

8. On 16 February 2015, West Yorkshire Pension Fund (**the Fund**), being the administering authority for the Council, issued its stage one response to Mrs N. The decision maker held that the Council had followed the correct process and regulatory requirements and taken into account all the relevant facts in reaching its decision. The decision maker noted that Dr Pandy, in his report, said that the treatment

planned for Mrs N would improve her symptoms with regard to her medical condition of fibromyalgia to enable to carry out her former substantive post.

9. Mrs N appealed under stage two of the IDRP.

10. On 23 September 2015, the Council issued its stage two IDRP response to Mrs N. The decision maker said he "cannot find fault with that conclusion on the evidence available at the time. However, it is a situation which needs to be kept under review."

11. On 30 September 2015, the Council subsequently wrote to Mrs N confirming its position. It stated that it had acknowledged that there had been further consultations with Mrs N's treating doctors. Mrs N was told that if she wished to pursue the matter further then it required a new application which could be considered on the basis of new information.

12. On 9 February 2016, Mrs N submitted a second application for IHER.

13. On 16 March 2016, the Council referred Mrs N to its Occupational Health (**OH**) doctor, Dr Wynn. Dr Wynn wrote to Dr Vila, Consultant Rheumatologist, and Mrs N's GP, Dr Dendle, for an up to date report. They were asked to include: an outline of the nature of her ongoing problems; outcome of relevant investigations; final diagnosis; current and intended treatment; and any significant precipitating and maintaining factors for her symptoms.

14. On 14 April 2016, Dr Dendle, in his report, confirmed Mrs N was diagnosed with fibromyalgia. He summarised Mrs N's symptoms, which included pain, fatigue, dizziness, loss of pleasure in nearly all activities, mouth ulcers and solar urticaria. Dr Vila, in her report dated 20 April 2016, confirmed Mrs N's diagnosis as probable lupus and that she described ongoing headaches which can last for two or three days. Dr Vila listed Mrs N's symptoms including hair thinning, erythema over her cheeks, itchy rash over her skin, pain everywhere in her muscles including her knees, left shoulder and elbows, poor memory and concentration and oral ulcers. Dr Vila said given Mrs N's symptoms it was probable that she was developing lupus and that the condition is not curable, but treatable with a range of disease modifying therapies and steroids.

15. On 6 May 2016, Dr Dendle sent a letter to Dr Wynn confirming that Mrs N had been diagnosed with breast cancer and that the extent of the disease and management plan was not known.

16. Dr Wynn referred Mrs N's case to a new IRMP, Dr Smith. On 3 August 2016, Dr Smith, in his report, confirmed that he had considered the following evidence:

    - Mrs N's OH reports from pre-employment questionnaire dated 11 March 2004 to 16 May 2016 including the consultation with Dr Wynn;
    - GP reports dated 14 May 2014, 27 May 2014 and 6 May 2016;
    - rheumatologist report, from Dr Ashok dated 9 September 2013;

- neurologist report, from Dr Anderson dated 12 December 2014; and
- rheumatologist report, from Dr Vila dated 20 April 2016.

17. Dr Smith, in his report, confirmed that Mrs N was diagnosed with fibromyalgia in 2013, and that diagnosis was made on the basis of finding no physical cause for her symptoms. He noted that the recent rheumatology opinion suggests an alternative physical cause of lupus. He said, while the condition was incurable, the report indicates that the symptoms attributable should be reversible and that there were disease modifying medications. Dr Smith concluded that, on the balance of probabilities, he expected the treatments available in the NHS, together with appropriate lifestyle measures, to achieve significant improvements in symptoms. He considered that Mrs N would be able to return to her former employment with some adjustments such as are typically found to be reasonable in research officer posts within the next two to three years. He certified that, in his opinion, Mrs N was not, because of ill health or infirmity of mind or body, incapable of discharging efficiently the duties of her former employment which would give rise to the payment of deferred benefits.

18. On 17 August 2016, the Panel considered Mrs N's application and came to the decision to refuse her application.

19. On 12 January 2017, Mrs N appealed against the decision of the Council. She said that the IRMP had failed to address the medical information supplied by her GP and Consultant and Dr Smith's comments about the diagnosis and the treatability of her symptoms was misleading and inaccurate.

20. On 8 May 2017, the Fund issued its stage one IDRP response to Mrs N. The decision maker was of the view that the report from Dr Smith was sufficiently detailed to enable Mrs N's former employer to make an informed decision in her case. He was also satisfied that the Council had followed the correct process and regulatory requirements when assessing whether she met relevant criteria for IHER and did not uphold Mrs N's appeal.

21. On 3 October 2017, Mrs N appealed under stage two of the IDRP.

22. On 21 December 2017, the Council issued its stage two IDRP response to Mrs N. The Council noted that Mrs N's GP and Consultant both confirmed that there was a diagnosis of lupus and that the condition was not curable although there were treatments and therapies for a range of symptoms attributable to the condition. The decision maker noted Dr Dendle, in his report dated April 2016, confirmed the diagnosis of fibromyalgia. Mrs N's symptoms were confirmed as pain, fatigue, dizziness, loss of pleasure in nearly all activities, mouth ulcers and solar uticaria. He noted that Mrs N's GP and Consultant both confirmed that she had been suffering these symptoms since 2012 and it had been exacerbated by her treatment for breast cancer since May 2016. The decision maker however pointed out that Dr Smith, in his review of Mrs N's medical history, was optimistic. He noted that Dr Smith thought that, whilst not all of Mrs N's symptoms were likely to be resolved all of the time, it

was possible, if not probable, that many of the symptoms could be alleviated by treatments, including steroids and other immunosuppressive medication and exercise.

23. Due to the conflicting medical evidence between Mrs N's GP and Consultant and Dr Smith, the Council held that it ought to have referred some further questions to Dr Smith. It wished to satisfy itself that the opinion of the IRMP had taken into account the history and length of the symptoms, treatments attempted to date and likely success of any as yet untried treatments.

24. On 2 January 2018, the Council emailed Mrs N explaining that it had asked for a further review by Dr Smith due to the conflicting medical advice over untried treatments and the question of permanent incapacity. Mrs N replied to the Council on the same day stating that it was unreasonable to seek a further opinion from the same IRMP and requested that a new IRMP be consulted.

25. On 3 January 2018, the Council replied to Mrs N and explained the further review was in order to seek clarification on conflicting medical information in order for the Council to make its decision.

26. On 27 February 2018, The Council put to Dr Smith three questions:

- clarify whether the information provided by Mrs N gave him cause to alter his certificate?
- did it remain his view that on balance of probabilities the conditions described were amenable to particular forms of treatments, as yet untried? If so, how would such treatments benefit Mrs N and within what expected timescales; and
- should Mrs N's mental illness be expected to prevent her engaging with further treatment?

27. On 1 May 2018, the Council emailed Mrs N confirming that it was still waiting for Dr Smith to provide his report.

28. On 14 May 2018, Dr Smith, in his report, confirmed he had taken into consideration all additional reports submitted by Mrs N and held that he was given no cause to alter his previous certificate. Dr Smith noted that a previous single injection had a good response and that would have given him good reason to think it likely that low dose regular steroid use would be likely to be effective as it is typically in lupus. Dr Smith referred to brain scan results which he believed were consistent with migraines which he had previously considered. He commented that none of the specialists or GP reports actually gave any prognosis for the future nor comment on future work capacity. Consequently, he said, on balance of probabilities, regarding the likely benefits of the treatments that he had suggested, there was nothing in the medical reports to contradict this view.

29. Dr Smith was of the opinion that the consistent application of treatments for conditions like lupus, fibromyalgia, back pain, depression/low mood or anxiety, were

likely to substantially improve Mrs N's symptoms. He thought this would allow her to return to work, such as that of a research officer, typically within one or two years and that activity and adjustments such as workstation position should help. He believed that it would be beneficial for Mrs N to engage and to adopt the treatments and exercise that had been suggested for her and she should see a benefit to her conditions.

30. On 20 June 2018, the Council issued its stage two IDRP response to Mrs N confirming it did not uphold Mrs N's appeal as she did not meet the requirement for IHER.

The Pension Ombudsman's Position on Ill Health Benefits

31. When someone complains that they have not been awarded the ill health (or incapacity) pension they think they should get, the Ombudsman looks at the way in which the decision has been reached.

32. The Ombudsman will not look at the medical evidence and make his own decision based on it, nor will he ask for more medical reports. The Ombudsman will consider whether the decision-maker has: (i) gone about making the decision in the right way; and (ii) made a decision that makes sense based on the evidence.

33. The Ombudsman does not have to agree with the decision. He will not intervene just because he thinks the decision-maker could have reached a different decision.

34. The Ombudsman will look at whether the decision-maker has followed the scheme's rules. Different pension arrangements have different rules about ill-health pensions. For example, sometimes the decision will be made by the employer, sometimes by the scheme's trustees or managers, or by a combination of all of them. The Ombudsman will look to see whether the right person has made the decision.

35. If the Ombudsman finds that there has been an error in the process or the way in which the decision-maker has reached their decision, he will usually order them to make the decision again. For example, he may ask them to obtain more evidence.

36. The Ombudsman can also look at whether there was any maladministration, such as delay. If he finds maladministration he may make an award for any non-financial injustice, such as distress or inconvenience.

Adjudicator's Opinion

37. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council The Adjudicator's findings are summarised below:-

    - The scheme rules or regulations determine the circumstances in which members are eligible for ill-health benefits, the conditions which they must satisfy, and the way in which decisions about ill-health benefits must be taken.

- In Mrs N's case, the relevant regulation is 38 of the 2013 Regulations (see the Appendix). Under Regulation 38 a deferred member may request payment of an ill health pension whatever their age if:
    - they become permanently incapable of discharging efficiently the duties of the employment they were engaged in when they became a deferred member; and
    - it is unlikely that they will be capable of gainful employment before normal pension age, or for at least three years, whichever is the earlier.
- One of the specific obligations on trustees and decision-makers acting for trustees is to consider all relevant information which is available to them and ignore all irrelevant information.
- Mrs N has said that Dr Smith's report was misleading and inaccurate. She also said his report questioned her formal diagnosis, diminished the impact of her health conditions and its symptoms, failed to address the effectiveness of further treatment and side effects. The Adjudicator could not see any evidence to show that Dr Smith did not properly review any aspect of Mrs N's concerns or conditions. Dr Smith's opinion took into account relevant evidence and referred to appropriate medical research. Mrs N disagrees with the conclusions reached, but that was not a sufficient reason for the Adjudicator to remit the matter back to the Council for the application to be reconsidered. There would have to be some other reason why the Council should not have relied on Dr Smith's advice in reaching a decision.
- Mrs N says that the Council accepted the IRMP's advice rather than taking into account the full facts of her case. The Council needed to consider Mrs N's IHER application in accordance with the Scheme's regulations and explain why her application either can or cannot be approved. The Adjudicator was satisfied that the Council complied with the Scheme's regulations and that all relevant evidence has been considered. A difference of medical opinion between the IRMP's and Mrs N's treating doctors is not sufficient for the Ombudsman to say that the Council's decision to accept the opinion of the IRMP, who is an expert in occupational health, was flawed.
- Mrs N says Dr Vila's opinion that she is unable to work seems to have been ignored and the Council relied solely on Dr Smith's report. However, there is a difference between ignoring evidence and considering evidence but attaching little or no weight to it. It is for the Council to apportion weight (if any) to the relevant medical evidence as it sees fit. The Adjudicator's role was to ensure the Council has at least considered all the relevant information. The Council has made its final decision based on Dr Smith's report and she could see that, in his report, he has made reference to both of Dr Vila's reports. She was satisfied that the Council has properly considered all the relevant information.

- Mrs N has questioned how a decision can be made that she is fit for work when she has not worked since November 2012 and is receiving Employment and Support Allowance. However, the Ombudsman's role is not to review the medical evidence and come to a decision of his own but to consider the decision making process. In this particular case, looking at the whole process from the time Mrs N challenged the IHER award to when the Council issued its IDRP stage two response, it was the Adjudicators view that it has considered all the relevant facts and followed the procedure correctly. As such there are no justifiable grounds to find that the Council's decision was unreasonable or that the process undertaken to reach its decision was flawed.

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

Ombudsman's decision

39. Mrs N has said she has been permanently ill and unable to work since November 2012. She provided a further GP report, dated 3 October 2019, which explained the severity of her condition stating that "it is pretty clear that work is not going to be an option for this lady". However, as explained by the Adjudicator in the Opinion, my role is not to review the medical evidence and come to a decision of my own but to consider the decision making process as it was at the time the decision was made. When Mrs N submitted her second application for IHER on 9 February 2016, Dr Smith subsequently gave his decision, based upon the balance of probability, using the evidence available at that time.

40. I sympathise that Mrs N has said there has been no improvement to her health despite the significant and on-going NHS treatment. However, the Council in reviewing its decision, cannot take into account events which have occurred after her IHER application was considered. I have reviewed the whole process, from the time Mrs N made her application for IHER, to when the Council issued its IDRP stage 2 response, and I find that throughout the Council has considered all relevant facts and applied the scheme rules correctly on the decision whether to grant IHER. There are no justifiable grounds for me to find that the Council's decision was perverse or that the substantive decision was flawed.

41. I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman
15 October 2019

Appendix

The Local Government Pension Scheme Regulations 2013 (SI 2013/2356)

As relevant Regulation 38, 'Early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members', says:

> "(1) A deferred member who, because of ill-health or infirmity of mind or body—
>
> (a)becomes permanently incapable of discharging efficiently the duties of the employment that member was engaged in at the date the member became a deferred member, and
>
> (b) is unlikely to be capable of undertaking gainful employment before normal pension age, or for at least three years, whichever is the sooner,
>
> may ask to receive payment of a retirement pension whatever the member's age.
>
> (2) A request under paragraph (1) must be made in writing to the deferred member's former Scheme employer or appropriate administering authority where the member's former Scheme employer has ceased to be a Scheme employer.
>
> (3) Before determining whether or not to agree to a request under paragraph (1), the deferred member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member is suffering from a condition that renders the member—
>
> (a) permanently incapable of discharging efficiently the duties of the employment the member was engaged in because of ill-health or infirmity of mind or body; and, if so,
>
> (b) whether as a result of that condition the member is unlikely to be capable of undertaking gainful employment before reaching normal pension age, or for at least three years, whichever is the sooner…
>
> …
>
> (6) Before determining whether to agree to a request under paragraph (4), the deferred pensioner member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member, as a result of ill-health or infirmity of mind or body, is unlikely to be capable of undertaking gainful employment before normal pension age.
>
> (7) If the Scheme employer is not the deferred or deferred pensioner member's appropriate administering authority, it must obtain that authority's consent to the appointment of an IRMP under this regulation.

(8) An IRMP appointed under paragraph (6) may be the same IRMP who provided the first certificate under **regulation 36(1)** (role of the IRMP)."