

## Ombudsman's Determination

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|-------------|--------------------|
| Applicant   | Ms E               |
| Scheme      | NHS Pension Scheme |
| Respondents | NHS Pensions       |

## Outcome

1. Ms E's complaint is upheld and to put matters right NHS Pensions shall allow her to submit an appeal against the 2015 decision not to pay her a pension under Regulation E2A.

## Complaint summary

2. Ms E disagrees with the decision not to award her ill health early retirement benefits when her NHS employment was terminated.

## Background information, including submissions from the parties

### Background

3. Ms E was employed as an ITU nurse until 8 October 2015; when her employment was terminated on the grounds of capability. Ms E had applied for early retirement on the grounds of ill health in September 2015, by submitting a form AW33E.
4. The relevant regulations are The National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended) (the **1995 Regulations**). As at the date Ms E's employment ceased, Regulation E2A(2) provided:

"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.

5. Further extracts from Regulation E2A are provided in the Appendix.
6. At the time, the authority to make first instance decisions on ill health retirement had been delegated to the Scheme’s medical advisors, OH Assist. On 19 October 2015, OH Assist wrote to Ms E declining her application for ill health retirement. It quoted from the doctor who had reviewed her case:

“I consider that the relevant medical evidence does not indicate that, on the balance of probabilities, the applicant is permanently incapable of efficiently discharging the duties of the NHS employment. The Tier 1 condition is not met. The rationale for this is as follows:

This lady has a history of low back pain over many years. Despite this, she has been able to provide employment as a Nurse until recently. She was assessed by a rheumatology specialist, and findings of degenerative spinal changes are in keeping with a diagnosis of mechanical back pain. She was encouraged to adopt a pain management approach to treatment. She has attended for CBT-based physiotherapy, and has access to pain relief medication. General medical consensus for the treatment of mechanical back pain is to encourage light activity and a return to adjusted work duties.

She has also suffered episodes of dizziness and blackouts over the past year. She has been investigated by a Neurology specialist who advises that the results of all investigations were normal. A diagnosis of pre-syncopal (faint) episodes has been made.

On the basis of the medical evidence available to me, I am of the opinion that there is no evidence to support a permanent incapacity to return to modified duties as a Nurse.”

7. The decision letter informed Ms E that, if she disagreed with the decision, she could ask to have her application reviewed under the Scheme’s two-stage internal dispute resolution (**IDR**) procedure.
8. In February 2016, Ms E completed a form AW8P to apply for the early payment of her deferred benefits. NHS Pensions wrote to Ms E, on 2 February 2016, acknowledging her application. It said her benefits would be actuarially reduced. NHS Pensions said its records showed that Ms E had applied for ill health retirement benefits. It said the 1995 Regulations only provided for an application for payment of benefits to be made once. NHS Pensions said, if Ms E’s deferred benefits were paid early, it would not be possible for it to consider putting a replacement ill health award into payment,

irrespective of the outcome of her application. NHS Pensions asked Ms E whether she wished to reconsider her decision to apply for the early payment of her deferred benefits. Ms E responded:

“I do wish to go ahead with the proceedings to take early payment of deferred pension benefit (EPPB). I do realise that it will be reduced and I can then not apply for ill health retirement.”

9. Ms E subsequently asked to exchange some of her pension for the maximum lump sum. Her pension was amended in April 2016 to allow for this.
10. On 30 October 2017, Ms E wrote to NHS Pensions saying that she wished to appeal the October 2015 decision to decline her application for ill health retirement. She said she had not challenged the decision before because she had not been “in the right state of mind”. Ms E asked that the decision be reconsidered on the grounds of unfair dismissal due to disability. She explained that she had been awarded Personal Independence Payments (**PIP**) in 2015. Ms E said her back, which had been an issue for 20 years, had worsened following a road traffic accident and a mugging. She also referred to her blackouts and said she was under investigation by a cardiologist. Ms E said she had been diagnosed with fibromyalgia and osteoarthritis.
11. NHS Pensions dealt with Ms E’s appeal under the IDR procedure. It issued a stage one decision on 20 December 2017. NHS Pensions said it was unable to uphold Ms E’s complaint because a member of the Scheme could only make one formal application for the payment of benefits. NHS Pensions said Ms E had already claimed an early retirement pension and, therefore, it was not possible to change the reason for retirement. NHS Pensions said this would be in breach of the Scheme’s Regulations. Ms E was informed that she had six months in which to ask for her complaint to be considered at stage two.
12. On 10 April 2018, Ms E submitted a request for her case to be considered at stage two. She said that, at the time she had asked for early payment of her deferred benefits, she had not been in the right frame of mind. Ms E explained that she had just lost her job and her house was about to be repossessed. She said she had no other income at that time. Ms E said the October 2015 decision had referred to her returning to work on light duties but her employer had said there were no suitable alternative roles. She said she felt that she should have been retired on ill health grounds, rather than dismissed.
13. NHS Pensions issued a stage two decision on 31 August 2018. It did not uphold Ms E’s complaint. The decision is summarised as follows:-
  - The NHS Pension Scheme rules were laid down in regulations agreed by Parliament. The Scheme was regarded as a statutory scheme by HM Revenue and Customs (**HMRC**). There was no discretion within the Regulations; NHS Pensions must ensure that the Regulations were adhered to and the benefits paid were only those which a member was legally entitled to receive.

- There was a difference between making an application for entitlement to ill health retirement benefits and submitting a claim for pension benefits. The first was a request for consideration of entitlement to ill health benefits; whilst the second was an actual claim for payment of retirement benefits.
- Under the Scheme Regulations, the actual claim for payment of retirement benefits was a statutory requirement and must be complied with by law. Once a member had accessed their pension benefits and crystallised those benefits, they had no further entitlement in the Scheme.
- Regulation E2A applied if the member's employment was terminated because of physical or mental infirmity. Although Ms E's health was a factor in her decision to end her employment, her employer had recorded that her employment ended due to voluntary resignation/retirement<sup>1</sup>.
- Furthermore, Ms E was no longer a 'member' of the Scheme within the meaning of the 1995 Regulations. Under the 1995 Regulations, a member meant "a person who is in pensionable service". She was, therefore, ineligible to apply for retrospective ill health retirement.
- This had been explained to Ms E in the letter dated 2 February 2016. She had responded that she wished to proceed with the early payment of her deferred benefits. She had said that she understood that they would be reduced and that she would not be able to apply for ill health benefits.
- It appreciated what Ms E had said about her health at the time. However, there was no provision in the 1995 Regulations for a person in receipt of an NHS retirement pension to have that pension retrospectively considered for an ill health pension.

### **Ms E's position**

#### 14. Ms E submits:-

- NHS Pensions said she should return to work on light duties but her employer said there were no suitable alternative roles. She has been appealing because both parties cannot be right.
- When she decided to take her pension early, she was not in a financial position to wait for what would have been a very lengthy process. Her home was about to be repossessed and she had no other income.
- She understands that, to qualify for an ill health pension, she must have a permanent condition and she has several. She understands that she must be deemed unfit to work until her state retirement age. Her back condition has

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<sup>1</sup> NHS Pensions has provided a printout of its records showing an entry for "End Reason Code" as "Voluntary resignation or retirement".

worsened; as have her other conditions. She was awarded PIP and this has been increased to the enhanced rate.

### **NHS Pensions' position**

15. NHS Pensions relies on the arguments put forward at stage one and two of the IDR procedure.

16. In addition, NHS Pensions submits:-

- Ms E applied for entitlement to benefits under Regulation E2A. However, when her application was assessed, neither the Tier 1 nor the Tier 2 conditions were satisfied. Therefore no entitlement to ill health retirement benefits existed.
- It takes the view that Ms E left pensionable employment without becoming entitled to a pension under any of Regulations E1 to E5. Therefore, as she completed form AW8 to claim her pension after she left pensionable employment, it has applied the 1995 Regulations correctly and paid retirement benefits in accordance with the 1995 Regulations.
- Ms E met the Regulation T1 criteria by making a claim for her pension. Regulation T1 would apply regardless of whether Ms E's claim was made under Regulation E2A or L1(3)(d). The facts are that Ms E made a claim under Regulation L1(3)(d); not Regulation E2A.
- Ms E could have appealed the ill health retirement decision under the IDR procedure. She chose not to do so and confirmed in writing that she wished to go ahead with taking her deferred benefits early. She confirmed that she realised that they would be reduced and that she could not then apply for ill health retirement benefits.
- Once a member has made a claim for their pension benefits and those benefits have been paid, NHS Pensions has discharged its liability in respect of those benefits. No further claim for benefits can be made because no further entitlement exists within the Scheme.
- When Ms E claimed her pension benefits, those benefits were crystallised within the meaning of the Finance Act 2004 (as amended).
- It understands that the approach the Pensions Ombudsman takes is to consider a case impartially; looking at the facts of a case without taking sides and establishing if something has gone wrong. It submits that there is no maladministration in this case.

## Adjudicator's Opinion

17. Ms E's complaint was considered by one of our Adjudicators who concluded that some further action was required by NHS Pensions. The Adjudicator's findings are summarised below:-

- Ms E had applied for benefits under Regulation E2A in September 2015. She had done so by completing and submitting form AW33E. Under Regulation E2A, Ms E was entitled to a pension if she met the Tier 1 condition or the Tier 2 condition in addition to the Tier 1 condition. This meant Ms E's employment had to have been terminated because of "physical or mental infirmity" and:
  - she was permanently incapable of her NHS employment; or
  - she was permanently incapable of regular employment of like duration in addition to being permanently incapable of her NHS employment.
- Ms E's employment was terminated on the grounds of capability due to ill health. This was evidenced by a letter from her employer dated 27 August 2015. The Adjudicator acknowledged that NHS Pensions' records showed Ms E's reason for leaving as resignation or retirement. However, her employer's letter indicated that this was an error. On that basis, Ms E had fulfilled the first part of the eligibility requirements set out in Regulation E2A; namely, her employment was terminated because of physical or mental infirmity.
- The August 2015 letter also confirmed that a form AW33E had been completed so that Ms E could apply for ill health retirement. The form contained sections which were to be completed by the employer and an occupational health physician. The occupational health physician had completed the relevant section of the AW33E on 25 September 2015. The information contained in the AW33E was needed in order to determine whether or not Ms E met the remaining requirements under Regulation E2A; namely, the Tier 1 or Tier 2 conditions. This decision was for OH Assist to make under its delegated authority.
- OH Assist had issued a decision on 19 October 2015. The decision was that Ms E did not meet the Tier 1 condition. If Ms E did not meet the Tier 1 condition, it was not necessary for OH Assist to consider if she met the Tier 2 condition because she had to meet the Tier 1 condition for any entitlement to arise.
- At that stage, OH Assist had determined that Ms E was not entitled to receive a pension under Regulation E2A. She was informed that she could ask for this decision to be reviewed. Ms E did not do so at that time. Instead, she asked for her deferred benefits to be put into payment early on a reduced basis. She had explained that, at the time, she was in a difficult financial position and did not want to wait for the outcome of a review.

- There was provision in the 1995 Regulations, at the time of Ms E's application, for a member to receive a deferred pension before normal pension age. Regulation L1(3)(d) provided:

"The member shall be entitled to receive the pension and retirement lump sum before age 60 if ...

(d) the member -

(i) left pensionable employment after 30th March 2000,

(ii) has reached the normal minimum pension age or, where relevant, protected pension age, and

(iii) has applied to the Secretary of State for payment of the pension and retirement lump sum under this regulation."

- Ms E had a protected pension age of 50 and was, therefore, potentially entitled to take her pension under Regulation L1(3)(d) on a reduced basis in February 2016.
- Ms E had submitted an appeal against the decision not to pay her pension under Regulation E2A after she had received payment of a pension under Regulation L1(3)(d). NHS Pensions had declined her appeal on the basis that she could not qualify for a pension under Regulation E2A because she has been paid a pension under Regulation L1(3)(d).
- It was true that Ms E could not receive a pension under both Regulations. Regulation L1 only applied if a member left pensionable service "without becoming entitled to a pension under any of regulations E1 to E5". Thus, in order to determine whether Ms E was entitled to receive a pension under Regulation L1(3)(d), it was necessary to decide whether or not she was entitled to a pension under Regulation E2A.
- Although OH Assist had issued a first instance decision, this was subject to appeal by Ms E. Ordinarily, it would be expected that a member would first appeal the Regulation E2A decision before exploring other options. Ms E had explained that her financial circumstances were such that she did not feel she could wait for a review. The question was, therefore, whether her application for payment of a pension under Regulation L1(3)(d) extinguished her right to appeal OH Assist's decision.
- NHS Pensions had drawn a distinction between making an application for entitlement to ill health retirement benefits and submitting a claim for pension benefits. It had suggested that the first was a request for consideration of entitlement to ill health benefits; whilst the second was an actual claim for payment of retirement benefits.

- Regulation T1 provided:

“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.”
- In the Adjudicator’s view, it was not possible to make the distinction suggested by NHS Pensions. Regulation T1 would apply whether the member was claiming a pension under Regulation E2A or L1(3)(d). And, in either case, it would be necessary to determine whether or not the member was entitled to receive the pension.
- Ms E had submitted a claim for entitlement to a pension under Regulation E2A in September 2015 when she submitted the AW33E. This was the form required by NHS Pensions, on behalf of the Secretary of State, at the time.
- In the Adjudicator’s view, that claim should take precedence over Ms E’s subsequent claim for a pension under Regulation L1(3)(d). Ms E should have been allowed to proceed with her appeal against OH Assist’s October 2015 decision. Her 2017 letter was not a retrospective application for ill health retirement; it was an appeal against the 2015 decision. Regulation L1 was quite clear that it did not apply unless the member was not entitled to a pension under “any of regulations E1 to E5”. Therefore, a claim to entitlement under Regulation E2A had to be decided first. Since Ms E had submitted an appeal against OH Assist’s decision, her entitlement under Regulation E2A had not been finally decided.
- The Adjudicator noted NHS Pensions’ argument that Ms E was no longer a ‘member’ of the Scheme when she submitted her appeal. However, at the time she submitted her claim for entitlement under Regulation E2A, she was still a member. It seemed unlikely that a member’s right of appeal could be extinguished by the termination of their employment. The Adjudicator said she had not found anything to that effect in the 1995 Regulations. In her view, provided she was a member at the time of submitting her claim, Ms E retained the right to appeal the 2015 decision regardless of the subsequent termination of her NHS employment.
- The Adjudicator said she had considered whether Ms E had in some way forfeited her right to claim entitlement under Regulation E2A by submitting a claim under Regulation L1(3)(d). She said she had not found any provision in the 1995 Regulations which suggested that a member might not make multiple claims or that a subsequent claim would extinguish an earlier one.
- There were circumstances in which a member of a pension scheme might forfeit an entitlement to benefits. There was specific provision in the 1995 Regulations for this, but the circumstances provided for did not arise in Ms E’s case.



- The position with regard to wider pensions legislation and caselaw was that, in general, a member's entitlement to a pension could not be assigned, surrendered, charged or made subject to set-off or lien. This was the case even if the member themselves wished to assign or surrender their pension; except in very specific circumstances. The principal pieces of legislation were Sections 91 to 95 of The Pensions Act 1995 and The Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc.) Regulations 1997 (SI1997/785). These were designed to protect a member's entitlement to benefit. Again, the circumstances in which the legislation allowed for a member's entitlement to benefit to be forfeited did not arise in Ms E's case.
- It was the Adjudicator's opinion that Ms E's complaint could be upheld because her entitlement to a pension under Regulation E2A had not been determined in a proper manner. Ms E had suffered injustice as a consequence because it was not yet clear that she was in receipt of the correct amount of pension.
- The Adjudicator suggested that, in order to put matters right, NHS Pensions should reconsider Ms E's appeal against the decision not to pay her a pension under Regulation E2A. NHS Pensions should first confirm with Ms E that she had submitted any additional evidence which she wished it to consider in connection with her appeal. If Ms E disagreed with the stage one decision, she was to be allowed to proceed to stage two.
- If, on appeal, NHS Pensions determined that Ms E was entitled to a pension under Regulation E2A, her benefits should be paid from October 2015; that is, from the day after her employment ceased. Any arrears should take account of any payments already made to Ms E and should include interest as provided for in the 1995 Regulations.

18. NHS Pensions did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHS Pensions provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the further arguments made by NHS Pensions for completeness.

### **Ombudsman's decision**

19. NHS Pensions' position is premised upon its view that Ms E was not entitled to receive an ill health retirement pension under Regulation E2A in October 2015. It is the case that OH Assist issued a decision to that effect in October 2015. However, that decision was subject to an appeal by Ms E. Regulation U2 provides for any dispute to be resolved by NHS Pensions, acting on behalf of the Secretary of State, in accordance with the IDR procedure.
20. Ms E was informed that she had the option to appeal OH Assist's decision under the two-stage IDR procedure. She did not do so at that time. Instead, she asked for her deferred pension to be paid early. Ms E was asked if she wished to proceed with the

early payment of her pension on the basis that it would not be possible for NHS Pensions to consider putting a replacement ill health award into payment subsequently. She confirmed that she wished to proceed. Ms E has explained that she was concerned about any delay in receiving payment of her pension because of her financial circumstances.

21. Ordinarily, a member would appeal a decision not to pay a pension under Regulation E2A before requesting payment under Regulation L1(3)(d). The question is whether a subsequent request for payment under Regulation L1(3)(d) can extinguish a member's entitlement under Regulation E2A. I do not find that it can.
22. Regulation E2A applies to a member who: retires from pensionable employment on or after 1 April 2008; did not submit an AW33E before that date; and is not in receipt of a pension under Regulation E2. A member to whom Regulation E2A applies is entitled to a pension under that Regulation if they meet the Tier 1 and/or Tier 2 conditions. Ms E meets the requirements for Regulation E2A to apply to her. If she also meets the Tier 1 and/or Tier 2 conditions, she would be entitled to a pension under that Regulation. It is only if Ms E does not meet the Tier 1 and/or Tier 2 conditions that she is not entitled to receive a pension under Regulation E2A.
23. It is Ms E's position that the original decision not to pay her a pension under Regulation E2A was incorrect. If that was indeed the case, the Scheme would not now be paying Ms E the pension to which she is entitled. I want to make it absolutely clear that, in saying this, I am not making a finding that the 2015 decision was incorrect. That remains to be seen. I do find that it would not be proper for the Scheme to continue to pay an incorrect pension simply because a member had requested payment of a different pension.
24. NHS Pensions has submitted, in effect, that it had been discharged of its "liability" for Ms E's pension once a pension had been put into payment. It submits that no further claim for benefits could be made because no further entitlement existed within the Scheme. I do not find this to be the case. Ms E is a member of the Scheme; in that she is "a person who ... has been in [pensionable] service and in respect of whom benefits under this Section of the scheme are ... payable". She is in receipt of a pension from the Scheme. The Scheme, therefore, retains a liability for Ms E's pension. Any liability for Ms E's pension could only have been extinguished if her pension rights had been transferred to another pension arrangement. NHS Pensions has a responsibility, on behalf of the Secretary of State, to ensure that members receive the benefits to which they are entitled. This responsibility does not cease on payment of a pension.
25. This is a question of determining Ms E's correct entitlement to a pension under the 1995 Regulations. It is not a question of deciding whether or not Ms E has applied for or claimed the correct pension. As it stands, because NHS Pensions has declined to hear Ms E's appeal against the 2015 OH Assist decision, it cannot be said that her correct entitlement to a pension has been settled in a fair and proper manner.

26. NHS Pensions has made reference to the Finance Act 2004. It submits that Ms E's benefits were crystallised when she claimed payment of her deferred pension under Regulation L1(3)(d). This is a reference to the tax regime for pension schemes set out in the Finance Act 2004. The Finance Act 2004 makes reference to a number of "benefit crystallisation events" when a pension scheme administrator is required to check that the member has not exceeded their "lifetime allowance". One of the benefit crystallisation events occurs when a member first begins to receive a pension from the scheme in question.
27. NHS Pensions will, however, be aware that the tax regime acknowledges that mistakes can happen. Where there has been a genuine error in the calculation and/or payment of a member's benefit, HMRC will allow corrections to be made without incurrance of a tax charge. HMRC does not require a member to be locked into receiving an incorrect amount of pension because a benefit crystallisation event has occurred.
28. The decision as to whether or not Ms E met the Tier 1 and/or Tier 2 conditions in October 2015 remains for NHS Pensions to make. It should, however, have allowed Ms E to submit her reasons for thinking that the 2015 decision was incorrect and given her appeal due consideration. Its failure to do so amounts to maladministration. Ms E has suffered injustice as a consequence because it is not yet clear that she is in receipt of the pension to which she is entitled under the 1995 Regulations.
29. Therefore, I uphold Ms E's complaint.

## **Directions**

30. Within 28 days of the date of this Determination, NHS Pensions shall confirm with Ms E that she has submitted all the evidence she wishes it to consider in connection with her appeal. On receipt of this confirmation, NHS Pensions shall reconsider Ms E's appeal under the Scheme's IDR procedure. If Ms E is not satisfied by its stage one decision, NHS Pensions shall allow her to proceed to stage two.
31. If, on appeal, NHS Pensions determine that Ms E was entitled to a pension under Regulation E2A, her benefits shall be paid from October 2015; that is, from the day after her employment ceased. Any arrears shall take account of any payments already made to Ms E and shall include interest as provided for in the 1995 Regulations.

## **Anthony Arter**

Pensions Ombudsman  
27 November 2019

## Appendix

### The National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended)

32. At the date Ms E's employment ceased, Regulations E2A on early retirement

- “(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.
- (4) Subject to paragraphs (5) and (6), if the member meets the tier 2 condition in addition to meeting the tier 1 condition, the pensionable service on which the pension is based will be increased by two-thirds of the pensionable service the member could have completed had he stayed in pensionable employment until normal benefit age.

- (5) If the member's employment is terminated on or before 31st March 2016, the minimum amount by which the member's pensionable service will be increased under paragraph (4) will be the lesser of -
  - (a) 4 years pensionable service; and
  - (b) the pensionable service the member could have completed if the member had stayed in pensionable employment until normal benefit age.
- (6) To the extent that any increase under paragraph (4) or (5) would cause a member's pensionable service to exceed the limit provided for in regulation C2(3) (meaning of pensionable service), the amount of any excess will be reduced accordingly.

...

- (13) For the purposes of determining whether a member is permanently incapable of efficiently discharging the duties of the member's employment under paragraph (2)(b)(i), the Secretary of State shall have regard to the factors in paragraph (15) (no one of which shall be decisive) 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 under paragraph (2)(b)(ii), the Secretary of State shall have regard to the factors in paragraph (16) (no one of which shall be decisive) 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 Secretary of State considers 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; and
- (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 Secretary of State considers 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, but does not include any treatment that the Secretary of State considers -

- (a) that it would be reasonable for the member to refuse,
- (b) would provide no benefit to restoring the member's capacity for -
  - (i) efficiently discharging the duties of the member's employment under paragraph (2)(b)(i), or
  - (ii) regular employment of like duration under paragraph (2)(b)(ii),before the member reaches normal benefit age; and
- (c) that, through no fault on the part of the member, it is not possible for the member to receive before the member reaches normal benefit age;

**“permanently”** means the period until normal benefit age; and

**“regular employment of like duration”** means -

- (a) in the case of a non-GP provider, such employment as the Secretary of State considers would involve a similar level of engagement to the member's current pensionable service as a non-GP provider; and
- (b) in all other cases, 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;
  - (ii) on a part-time basis, regular employment on a part-time basis,regard being had to the number of hours, half-days and sessions the member worked in that employment.”