PO-28281

Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme (Scotland) 2015
Respondent	Scottish Public Pensions Agency (**SPPA**)

Outcome

1. I do not uphold Mrs E's complaint and no further action is required by SPPA.

Complaint summary

2. Mrs E has complained that she has not been awarded an Upper Tier ill health retirement pension.

Background information, including submissions from the parties

Background

3. Mrs E was employed as a part-time (20 hours per week) auxiliary nurse. She went on long-term sickness absence in June 2017, and her employment ceased in November 2017. She applied for ill health retirement in January 2018. SPPA awarded Mrs E a Lower Tier ill health retirement pension in April 2018.

4. The relevant regulations are contained in The National Health Service Pension Scheme (Scotland) Regulations 2015 (SSI2015/94) (as amended) (the **2015 Regulations**). The 2015 Regulations provide for two tiers of pension payable on ill health retirement from active service: a Lower Tier pension; or an Upper Tier pension. In order to receive either tier of pension, a member must satisfy the conditions set out in the 2015 Regulations. For a Lower Tier pension, the Scheme Manager must be satisfied that the member suffers from physical or mental infirmity, as a result of which s/he is permanently incapable of efficiently discharging the duties of her/his NHS employment. For an Upper Tier pension, in addition to satisfying the Lower Tier conditions, the Scheme Manager must be satisfied that the member is also permanently incapable of engaging in regular employment of like duration. Extracts from the 2015 Regulations are provided in Appendix 2.

5. In June 2018, Mrs E appealed SPPA's decision via the Scheme's one-stage internal dispute resolution (**IDR**) procedure. SPPA sought further advice from its medical

adviser. In response, the medical adviser said no evidence had been presented indicating what investigation and treatment might have been provided or planned. SPPA wrote to Mrs E, on 24 July 2018, informing her that its medical adviser required further medical evidence. It quoted the response it had received from its medical adviser and suggested Mrs E might want to discuss this with her GP or with any specialists involved in her care.

6. Mrs E submitted letters from her GP and two consultants, together with copies of her medical records. Summaries of and extracts from the medical evidence relating to Mrs E's case are provided in Appendix 1.

7. SPPA issued a decision, on 3 January 2019, declining Mrs E's appeal. Its decision is summarised below:-

    - The questions for consideration were:-
        - Whether Mrs E was permanently incapable by reason of physical or mental infirmity of efficiently discharging the duties of her NHS employment;
        - If so, whether she was permanently incapable of engaging in regular employment of like duration; and
        - Whether she was so incapacitated when her employment ended.
    - It had reviewed all the previously submitted evidence and the new evidence. It listed the evidence considered. It had considered the advice provided by an independent medical adviser. It provided a copy of the medical adviser's report for Mrs E.
    - It had determined that Mrs E was eligible for Lower Tier ill health benefits.

Mrs E's position

8. Mrs E submits:-

    - She worked at the hospital for 35 years. She also worked in a bar. For the last nine years, she had worked for 30 hours per week. She reduced her hours to 20 per week in the last few months when her pain became intolerable.
    - She had to stop taking the medication which had been helping her because it caused cysts in her kidneys.
    - Her condition has not improved since she gave up work.
    - The pain clinic has said that there is nothing else which it can offer her. Her GPs have also told her that there is nothing else they can give her.
    - There is no way she will be able to work unless she is able to get her pain under control. There is nothing after her current medication, so this is her last resort.

SPPA's position

9. SPPA has referred to the advice it received from its medical advisers (see Appendix 1). It says the medical advisers concluded that there was a lack of essential evidence to support the view that Mrs E is permanently incapable of undertaking any regular employment of like duration before her normal pension age of 66 and, therefore, she does not meet the conditions for an Upper Tier pension. SPPA says that an underlying question remains around the permanency of Mrs E's condition and, in considering this, the treatments available to her which may improve her current condition. It says it sympathises with Mrs E in suffering from a debilitating condition but remains of the view that the medical evidence indicated that the Upper Tier conditions are not met.

Adjudicator's Opinion

10. Mrs E's complaint was considered by one of our Adjudicators who concluded that no further action was required by SPPA. The Adjudicator's findings are summarised below:-

- Members' entitlements to benefits when taking early retirement due to ill health were determined by the scheme rules or regulations. The scheme rules or regulations determined the circumstances in which members were eligible for ill health benefits, the conditions which they had to satisfy, and the way in which decisions about ill health benefits had to be taken.

- In Mrs E's case, the relevant regulations were 89 and 90 in the 2015 Regulations (see Appendix 2). Under Regulation 89, in order to receive an Upper Tier pension, Mrs E had to satisfy the Lower Tier conditions and be considered permanently incapable of engaging in regular employment of like duration. "Regular employment of like duration" was defined in relation to the type of employment (full-time or part-time) which the member was undertaking. In Mrs E's case, she was working part-time and, therefore, the regular employment by reference to which she is to be assessed is also part-time. It did not have to be the same or similar to her NHS role; it could be any type of employment.

- Decisions as to entitlement under Regulation 89 were to be made by the Scheme Manager, which was defined as the Scottish Ministers. SPPA took the decision on behalf of the Scottish Ministers. Decisions under Regulation 89 were not discretionary. In other words, SPPA was simply required to determine whether Mrs E satisfied the Upper Tier conditions. If she did, she was entitled to an Upper Tier pension.

- SPPA had agreed that Mrs E satisfied the Lower Tier conditions. The disagreement lay in its decision that Mrs E was not permanently incapable of engaging in regular employment of like duration.

- Regulation 90 sets out the factors which SPPA had to have regard to or ignore when making a decision under Regulation 89. Briefly, for the purposes of determining whether Mrs E was permanently incapable of regular employment of like duration, SPPA had to consider: (a) whether she had received appropriate treatment; (b) what reasonable employment she would be capable of; (c) the type and period of rehabilitation it would be reasonable for her to undergo; and (d) the type and period of training it would be reasonable for her to undergo. It was to ignore Mrs E's preferences and her location.

- The 2015 Regulations did not specifically require SPPA to seek medical advice before making a decision under Regulation 89. The 2015 Regulations did provide SPPA with the option to require a member applying for an ill health retirement pension to submit to an examination by a medical practitioner chosen by it[1]. If it did so, it had also to allow the member to submit a report from her/his own doctor. Nevertheless, SPPA did seek medical advice before making a decision, which was good practice. It also obtained evidence from Mrs E's own medical practitioners. Again, this was good practice.

- One of the specific obligations on SPPA was to consider all the relevant information which was available to it and ignore any irrelevant information. However, the weight which SPPA attached to any of the evidence was for it to decide; including giving some evidence little or no weight. It was open to SPPA to prefer the advice it received from its own medical advisers, unless there was a good reason why it should not do so or should not do so without first seeking clarification. The Adjudicator said the kind of things she had in mind were errors or omissions of fact or a misunderstanding of the regulatory requirements.

- When reviewing the medical evidence, SPPA was only expected to look at the evidence from a lay perspective. It would not be expected to challenge a medical opinion. If there was a significant difference of opinion between its advisers and the member's own doctors, it could be expected to seek an explanation if this had not already been provided. A difference of opinion between the medical practitioners was not usually sufficient reason for the decision-maker to be asked to retake a decision. So far as their medical opinions were concerned, the medical advisers did not come within the Ombudsman's jurisdiction. They were answerable to their own professional bodies and the General Medical Council (**GMC**).

- In Mrs E's case, SPPA had accepted the advice it received from its own medical advisers that she was not permanently incapable of regular employment of like duration. It was, therefore, appropriate to consider this advice in detail.

[1] Paragraph 15, Part 6, Schedule 3.

- The report provided for SPPA in April 2018 appeared to lack detail as to reasons why the medical adviser thought Mrs E was unlikely to be permanently unable to work in other employment of like duration. The medical adviser had noted that there were seven and a half years to Mrs E's normal pension age. S/he had expressed the view that, on the balance of probabilities, Mrs E "could recover enough to do sedentary jobs that are available in the open job market". However, the medical adviser had not discussed why s/he thought this would be the case; for example, s/he had not referred to any particular treatment likely to help Mrs E achieve this.

- However, not all procedural defects would mean that the decision could not be allowed to stand. For example, if procedural failings occurred at an early stage in the process and the impact of the failing was corrected later, the Ombudsman might take the view that the procedural failings did not invalidate the decision. For this reason, it was necessary to consider the subsequent advice provided for SPPA.

- Following Mrs E's appeal, SPPA had written to her quoting from its medical adviser who had explained what would be considered in order to assess her for the Upper Tier pension. SPPA had given Mrs E the opportunity to submit further evidence.

- The final advice provided for SPPA by its medical advisers was more detailed and, in particular, included details of the treatment options the adviser thought would help Mrs E recover sufficiently to undertake regular employment of like duration. The medical adviser had said s/he would expect such treatments to be available to Mrs E and did not anticipate that they would have a negative impact upon her well-being. S/he had concluded that, in the absence of evidence that such treatments had been exhausted or a specialist opinion to explain why they might not be effective, s/he did not have evidence to suggest that Mrs E's current symptoms were likely to persist until her normal pension age. The medical adviser had acknowledged that Mrs E's condition had not improved despite her compliance with her limited medical management to date. S/he had said s/he would, nevertheless, anticipate that spontaneous improvement in Mrs E's condition was likely.

- Having reviewed the advice provided for SPPA, the Adjudicator said she had not identified any reason why it should not have relied on that advice in reaching its decision. There appeared to be no error or omission of fact on the part of the medical adviser. S/he appeared to have considered all of Mrs E's conditions and the treatment she had received to date. The medical adviser appeared to have understood the Upper Tier conditions and to have had access to Mrs E's job description.

- Nor could it be said that the SPPA's medical adviser's opinion was significantly at odds with the evidence provided by Mrs E's own medical practitioners. Her GP had provided details of Mrs E's symptoms and treatment, but had not

expressed a view as to prognosis. The Adjudicator noted that Mrs E's physiotherapist had expressed the view that she was not fit to carry out an administration job at present and for the foreseeable future. However, it was not clear whether he had taken the effects of future treatment into account or what he had meant by the foreseeable future. The Adjudicator said she had not identified anything which should have prompted SPPA to seek further clarification from its medical advisers before relying on their advice.

11. Mrs E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs E 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 main points made by Mrs E for completeness.

Mrs E's further comments

12. Mrs E has explained that her condition has deteriorated since she had to give up work due to fibromyalgia. She says she cannot get her pain under control and she is in agony all the time. She says she cannot sleep due to the pain. Mrs E has explained that she is having to constantly go to her doctors to try different things, but nothing has helped and this has been going on for months.

Ombudsman's decision

13. I appreciate that it must be extremely difficult for Mrs E having to live with a condition like fibromyalgia. This must be particularly so when it appears that she has not yet found any treatment which helps her.

14. However, in order to receive a Upper Tier pension, Mrs E must satisfy the conditions set out in Regulation 89. In particular, she must be considered "**permanently** incapable of engaging in regular employment of like duration" (emphasis added). "Permanently" means until Mrs E attains her prospective normal pension age of 66. It is accepted that Mrs E is currently unable to engage in regular employment of like duration because of her fibromyalgia. The question is whether Mrs E's incapacity for such employment is likely to last until she reaches age 66.

15. The advice which SPPA received was that it was more likely than not that Mrs E's condition would improve sufficiently before her 66th birthday for her to be able to engage in regular employment of like duration. SPPA's medical advisers referred to a number of treatment options which they considered likely to improve Mrs E's condition, including medication, physiotherapy and psychological therapy. Mrs E has said that her condition has not improved since she ceased working and that it has deteriorated.

16. Insofar as their medical opinions are concerned, SPPA's medical advisers do not come within my jurisdiction. As my Adjudicator explained, they are answerable to their own professional bodies and the GMC. The question for me is whether there was any reason why SPPA should not have relied on the advice it received from its

medical advisers in making its decision. The reason would have to be apparent to a lay person; SPPA cannot be expected to challenge a medical opinion. This might include, but is not limited to, errors or omissions of fact, failure to consider all relevant medical conditions or a misunderstanding of the Upper Tier conditions.

17. I agree that the advice received from the first medical adviser was lacking in detail. However, subsequent reports did go into some detail as to why the medical adviser considered it likely that Mrs E's condition would improve before her 66th birthday. The fact that Mrs E's condition has not yet shown any improvement does not, in and of itself, invalidate the medical advisers' opinions.

18. I find that SPPA was entitled to rely on the advice it received from its medical advisers in reaching its decision on Mrs E's eligibility for an Upper Tier pension. Its decision is supported by that advice and is compliant with the 2015 Regulations.

19. I do not uphold Mrs E's complaint.

Anthony Arter

Pensions Ombudsman
31 March 2020

Appendix 1

Medical evidence

20. In a letter to Mrs E's GP dated 24 April 2017, Dr Bielinska, a consultant in anaesthesia and pain management, said Mrs E had a three year history of all over pain, which she had self-diagnosed as fibromyalgia. Dr Bielinska discussed Mrs E's current medication and noted she had been unable to tolerate alternatives. She discussed the results of her examination of Mrs E and the treatment options she had suggested to Mrs E. Dr Bielinska asked Mrs E's GP to provide a trial of another treatment and said she had not arranged to see Mrs E again.

21. In a letter to SPPA's medical adviser dated 8/15 February 2018, Dr Bielinska said she had only seen Mrs E once in the pain clinic. She referred to Mrs E suffering with coronary artery and oesophageal spasms and said she currently had microcytic anaemia, which would be contributing to her fatigue. Dr Bielinska said she was unable to give a prognosis and explained that the aim of the pain clinic was to enable patients to self-manage their pain and retain activity levels. She said it was rare for patients to report a dramatic resolution of their pain.

22. In a letter to Mrs E's GP dated 24 April 2018, Dr Taha, a consultant at Mrs E's local gastroenterology clinic, discussed the results of tests Mrs E had undergone and her medication. S/he noted that Mrs E had responded to oral iron and said s/he had not arranged to see her again.

23. In April 2018, SPPA's medical adviser said:

> "As for upper or lower tier, considering the like duration, as per the criteria, 20 hours per week, and considering that the normal retirement age of 66 which is nearly 7½ years away, one could expect, on that balance of probabilities, [Mrs E] could recover enough to do sedentary jobs that are available in the open job market.
>
> Therefore, on the balance of probabilities, I would consider the lower tier award in this case. With regards to the HMRC's sever[e] ill-health test, it is my opinion, that the criteria are not met. In the circumstances, it is my opinion there is:
>
> - Reasonable medical evidence that, on the balance of probabilities, [Mrs E's] health problems currently prevent her from discharging the duties of her employment and this is likely to be permanent.
> - Reasonable medical evidence is NOT available to suggest that [Mrs E] would not be able to work in other employment of like duration.
>
> Should [Mrs E] wish to appeal, a detailed view on functional limitations and reasons as to why non-manual handling roles, or roles based on single office base environment or other jobs with less physical demands, with appropriate

workplace support from external agencies such as access to work etc, cannot be undertaken for like duration – 20 hours per week."

24. On 7 June 2018, Mrs E's GP wrote an open letter. She confirmed that Mrs E had been attending her surgery with chronic pain for at least five years and had been diagnosed with fibromyalgia. The GP described Mrs E's symptoms. She said Mrs E had coronary artery spasm, fatty liver, intermittent depression, hypertension and gastritis with erosion.

25. On 9 July 2018, Mr Smith, an occupational therapist, wrote to SPPA. He said Mrs E had been referred to him following her assessment for ill health retirement benefits. Mr Smith said Mrs E had informed him that she had tried a number of non-clinical roles in her last few months at work, which had not been included in the medical adviser's report. He said he had asked the ward manager to provide a report but had not received this. Mr Smith said he had met Mrs E and carried out four standardised assessments. He attached his notes of these. Mr Smith said the assessments strongly suggested that Mrs E was not fit to carry out an administration job at present and for the foreseeable future.

26. In July 2018, SPPA's medical adviser said:

"It may be that there is more information to consider but I can only provide advice on what has been presented to me. [Mrs E] has long-standing pain with fatigue that limits her ability to undertake physical activities and tasks. [Mrs E] has been assessed in pain clinic with a new medication … noted to have been of benefit with regard to her symptoms.

There is no evidence presented as to what other interventions may be provided as a consequence of her engagement with the pain clinic but would anticipate that a holistic approach to her pain management may include the initiation of alteration to prescribed medication, exercise therapy, physical therapy, neuromodulator treatments, injection therapy, talking therapy, psychological therapy or cognitive behavioural therapy. On this basis, it cannot be concluded that reason of [*sic*] therapeutic options have been exhausted.

[Mrs E] is noted to have been intermittently diagnosed with depression since 1996 with a recent assessment indicating symptoms sufficient to warrant a clinical diagnosis of depression and symptoms of anxiety. These symptoms are noted to represent a limitation or barrier to [Mrs E's] engagement with treatment but there is no evidence of any assessment, specialist or otherwise, of her mental well-being.

I would anticipate that such an assessment may result in the initiation of alteration to prescribed medication, talking therapy, psychological therapy or cognitive behavioural therapy. On this basis it cannot be concluded that reasonable therapeutic options have been exhausted.

[Mrs E] has advised that she was to undergo a hospital-based assessment 21 June but no evidence has been preserved [*sic*] provided as to the nature or outcome of this assessment. On this basis it is not possible to understand what treatments may be planned or offered to [Mrs E].

There is no evidence to confirm what investigation and treatment has been advised with regard to [Mrs E's] anaemia or her new onset hip and back pain. Anaemia has many causes with appropriate treatment being likely to result in reduced fatigue.

Hip pain is a common symptoms [*sic*] but should it arise from osteoarthritis, common with advancing age and increased body mass index, it is likely to respond to treatment which may include physiotherapy, injection therapy or it may be appropriate to undertake an orthopaedic assessment to determine [Mrs E's] appropriate treatment pathway.

I would expect such treatments and interventions to [be] available to [Mrs E], I do not anticipate that they would have a negative impact upon her well-being and the effect of the same would become clear in a matter of months. In the absence of evidence that such treatments have been exhausted or any specialist opinion to explain why they might not be effective I do not, yet, have evidence to suggest that [Mrs E's] current symptoms are likely to persist until her normal pension age in 7 years."

27. On 6 November 2018, Mrs E's GP wrote an open letter. She confirmed that Mrs E had seen the community mental health team in 1997 and had been attending the GP's surgery since for depression and anxiety. The GP said Mrs E's anaemia had resolved but she still had chronic fatigue. She said Mrs E had been diagnosed with fibromyalgia and had attended the surgery with chronic pain since 2010. The GP discussed Mrs E's symptoms and referred to letters from the pain clinic, which she had attached. The GP referred to coronary investigations Mrs E had undergone and a letter relating to these. She said Mrs E had fatty liver disease, hypertension and simple renal cysts. She provided details of Mrs E's medication.

28. In response to Mrs E's IDR submission, SPPA's medical adviser said:

"I note that [Mrs E] worked part time (20 hours per week) as an Auxiliary Nurse Grade 2. A job description has been provided and I have seen this sort of work which is to provide clinical care to a defined patient group … The role requires significant time on the feet, frequent manual handling and can be emotionally challenging."

29. SPPA's medical adviser referred to the April 2018 report. S/he said the previous medical adviser had noted the following:-

- Mrs E had been experiencing generalised body and limb pain with fatigue since 2010 and had been diagnosed with fibromyalgia.

- Mrs E had been diagnosed with coronary artery spasm after an admission to hospital with chest pain.
- Mrs E's GP's reports had confirmed the diagnoses and that Mrs E had trialled a number of medications with limited benefit.
- The pain consultant had advised that microcytic anaemia was likely to be contributing to Mrs E's fatigue. Medication described by the pain consultant was observed to have provided some benefit to Mrs E. The pain consultant had advised that full resolution of Mrs E's symptoms was unlikely.
- The mainstays of treatment for fibromyalgia and associated fatigue were graded exercise and pain relief.

30. SPPA's medical adviser reviewed the evidence provided by Mrs E's doctors, including her primary care records and the assessments undertaken by Mr Smith. S/he said:

> "It may be that there is more information to consider but I can only provide advice on that which has been presented to me. There remains no evidence that [Mrs E] has engaged in a holistic management program for her chronic pain which I would anticipate may include the initiation of alteration to prescribed medication, physical therapy, exercise therapy, occupational therapy, injection therapy, neuromodulator treatments, talking therapy, psychological therapy or cognitive behavioural therapy.
>
> I note that she has recently been referred to physiotherapy but there is no indication as to whether this is a chronic pain specialist physiotherapy or musculoskeletal physiotherapy in the absence of any indication as to the intent of this referral, the treatment to be provided or the effects of the same, it is not possible to conclude that reason[able] therapeutic options have been exhausted.
>
> There is no evidence that [Mrs E] has been afforded the opportunity to engage in specialist treatment with regard to her anxiety and depression or her health beliefs which are thought to represent a barrier to her recovery. A special[ist] assessment may result in the initiation of alteration to prescribed medication, talking therapy, psychological therapy or cognitive behavioural therapy.
>
> I note that [Mrs E] has very recently been referred for such an assessment and in the absence of information regarding the outcome of this assessment, treatment planned or provided and the outcome of the same, it is not possible to conclude that reasonable therapeutic options have been exhausted.
>
> I would expect such treatments and interventions to [be] available to [Mrs E]. I do not anticipate that they would have a negative impact upon her well-being and the effect of the same would become clear in a matter of months. In the absence of evidence that such treatments have been exhausted or any

specialist opinion to explain why they might not be effective I do not, yet, have evidence to suggest that [Mrs E's] current symptoms are likely to persist until her normal pension age in 6 years.

In my opinion, while it is clear that [Mrs E] has been compliant with her limited medical management to date, that despite this her condition has not improved sufficient to allow her to return to her NHS duties or engage in regular employment of like duration, I would anticipate that spontaneous improvement in her condition is likely. It follows that I cannot be persuaded, even on the balance of probabilities, that [Mrs E] is permanently incapable of engaging in regular employment of like duration.

In the circumstances it is my opinion there is reasonable medical evidence that [Mrs E's] problems currently prevent her from engaging in regular employment of like duration. There is however not, yet, reasonable medical evidence that her medical condition will continue to prevent her from engaging in regular employment of like duration."

Appendix 2

The National Health Service Pension Scheme (Scotland) Regulations 2015

31. As at the date Mrs E's employment ceased, Regulation 89 provided:

"(1) An active member (M) is entitled to immediate payment of -

(a) an ill-health pension at Lower Tier (a Lower Tier IHP) if the Lower Tier conditions are satisfied in relation to M;

(b) an ill-health pension at Upper Tier (an Upper Tier IHP) if the Upper Tier conditions are satisfied in relation to M.

(2) The Lower Tier conditions are that -

(a) M has not attained normal pension age;

(b) M has ceased to be employed in NHS employment;

(c) the Scheme Manager is satisfied that M suffers from physical or mental infirmity as a result of which M is permanently incapable of efficiently discharging the duties of M's employment;

(d) M's employment is terminated because of the physical or mental infirmity; and

(e) M claims payment of the pension.

(3) The Upper Tier conditions are that -

(a) the Lower Tier conditions are satisfied in relation to M; and

(b) the scheme manager is also satisfied that M suffers from physical or mental infirmity as a result of which M is permanently incapable of engaging in regular employment of like duration.

…

(5) In paragraph (3)(b), **"regular employment of like duration"** means -

(a) …

(b) in any other case, where prior to ceasing NHS employment M 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 M worked in the employment …"

32. Regulation 90 provided:

> "(1) For the purpose of determining whether a member (M) is permanently incapable of discharging the duties of M's employment efficiently, the scheme manager must -
>
> (a) have regard to the factors in paragraph (2), no one of which is to be decisive; and
>
> (b) disregard M's personal preference for or against engaging in the employment.
>
> (2) The factors mentioned in paragraph (1)(a) are -
>
> (a) whether M has received appropriate medical treatment in respect of the infirmity;
>
> (b) M's mental capacity;
>
> (c) M's physical capacity;
>
> (d) the type and period of rehabilitation it would be reasonable for M to undergo in respect of the infirmity, regardless of whether M has undergone the rehabilitation; and
>
> (e) any other matter the scheme manager thinks appropriate.
>
> (3) For the purpose of determining whether M is permanently incapable of engaging in regular employment of like duration as mentioned in paragraph (3)(b) of regulation 89, the scheme manager must -
>
> (a) have regard to the factors in paragraph (4), no one of which is to be decisive; and
>
> (b) disregard the factors in paragraph (5).
>
> (4) The factors mentioned in paragraph (3)(a) are -
>
> (a) whether M has received appropriate medical treatment in respect of the infirmity;
>
> (b) such reasonable employment as M would be capable of engaging in if due regard is given to -
>
> (i) M's mental capacity;
>
> (ii) M's physical capacity;
>
> (iii) M's previous training; and
>
> (iv) M's previous practical, professional and vocational experience,

irrespective of whether or not such employment is available to M.

(c) the type and period of rehabilitation it would be reasonable for M to undergo in respect of the infirmity, regardless of whether M has undergone the rehabilitation, having regard to -

(i) M's mental capacity; and

(ii) M's physical capacity.

(d) the type and period of training it would be reasonable for M to undergo in respect of the infirmity, regardless of whether M has undergone the training, having regard to -

(i) M's mental capacity;

(ii) M's physical capacity;

(iii) M's previous training; and

(iv) M's previous practical, professional and vocational experience; and

(e) any other matter the scheme manager considers appropriate.

(5) The factors mentioned in paragraph (3)(b) are -

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

(b) the geographical location of M.

(6) In this regulation -

"appropriate medical treatment" means such medical treatment as it would be normal to receive in respect of the infirmity, but does not include any treatment that the scheme manager considers -

(a) that it would be reasonable for M to refuse;

(b) would provide no benefit to restoring M's capacity for -

(i) discharging the duties of M's employment efficiently for the purposes of paragraph (2)(c) of regulation 89; or

(ii) engaging in regular employment of like duration for the purposes of paragraph (3)(b) of that regulation;

(c) that through no fault on the part of M, it is not possible for M to receive before M reaches normal pension age.

"permanently" means until M attains M's prospective normal pension age; and

“regular employment of like duration” has the same meaning as in regulation 89.”