

Ombudsman's Determination

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

Outcome

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

Complaint summary

2. Mrs S' complaint against SPPA concerns its decision not to award her an ill health early retirement pension (**IHER**).

Background information, including submissions from the parties

3. The sequence of events is not in dispute. In summary they are set out below.
4. On 22 January 2018, Mrs S made an application for IHER.
5. On 18 April 2018, Mrs S ceased employment with NHS Glasgow.
6. On 18 May 2018, SPPA declined Mrs S' application for IHER. It held that based on the medical evidence available and following the advice of the Scheme's medical advisor (**MA**), it was not satisfied that she is permanently incapable of engaging in regular employment of like duration or permanently incapable of efficiently discharging the duties of her employment.
7. The MA referred to Mrs S' GP's, (Dr Robinson) report, dated 1 February 2018, who confirmed that Mrs S was advised to restart treatment with a beta-blocker such as propranolol but that she declined such treatment as she had been advised that there was a possibility that this may make her dizziness worse.
8. The MA noted that Dr Robinson had also said there were no current plans for any future treatment, referrals or investigation as Mrs S is currently well. He referred to an ENT report, dated 3 April 2017, that confirmed Mrs S' symptoms were due to migraine. The consultant ENT surgeon, Mr Bingham, advised restarting propranolol which had previously been beneficial in managing her migraine symptoms. He was of

the opinion that “there is a good prospect that with the beta-blocker and conservative management Mrs S is likely to see improvement through the year.”

9. As a result of this, SPPA said it was not possible to determine whether reasonable treatment options had been exhausted. It noted that Mrs S had previously declined any intervention to manage perceived workplace stress and so it was not possible to understand whether, with suitable adjustments and support, she would be likely to sustain a return to her former NHS role. It said there was no evidence that Mrs S had been referred for specialist assessment by a pain management service, should her migraines have recurred; a review may result in the initiation of prescribed medication, exercise therapy, physical therapy, injection therapy, neuromodulation re-treatments, talking therapy, psychological therapy or cognitive behavioural therapy.
10. The decision maker was of the opinion such interventions and treatments would not have a negative impact upon her well-being. In the absence of evidence that such treatments had been exhausted, or any specialist’s opinion to explain why they might not be effective, it did not yet have evidence to suggest that Mrs S’ current symptoms were likely to persist until her normal pension age in five years.
11. On 13 July 2018, Mrs S appealed SPPA’s decision and provided a further letter from her GP, Dr Robinson, dated 13 July 2018. In his report, Dr Robinson confirmed that Mrs S’ medical condition was long standing, and that she continued to suffer from migraines, of which debilitating vertigo is a symptom. She confirmed Mrs S’ migraine is caused by work stress and said that as long as she continues in her current employment, Mrs S would continue to experience migraines. Dr Robinson concluded that Mrs S’ current job makes her too ill to continue in that employment.
12. On 5 December 2018, SPPA issued its internal dispute resolution procedure (**IDRP**) response to Mrs S. SPPA confirmed it took into consideration all previously submitted evidence including the consultant’s report dated 3 April 2017, and the GP’s reports dated 1 February 2018 and 13 July 2018. SPPA referred Mrs S’ case to an MA.
13. The MA said:

“In summary the evidence suggests that Mrs S is significantly impaired by migraine when facing stress. However, published evidence would suggest that the majority of individuals experiencing significant symptoms of chronic migraine will experience a reduction in symptoms if treated with appropriate prophylactic medication under specialist guidance. Whilst it may be considered an individual’s autonomous right to decline such prophylaxis, it remains the case that one cannot consider they have exhausted standard treatment options if they choose to pursue this course. I do not believe therefore that the evidence currently supports the situation to be that Mrs S would be more likely than not unfit on a permanent basis to resume a nursing post with appropriate management measures introduced to monitor and act upon any escalating stress levels, with the benefit of appropriate acute and prophylactic migraine medication under the care of a neurologist.”

14. The MA held that there was no reasonable medical evidence that Mrs S' health condition permanently prevented her from discharging the duties of her employment and from engaging in regular employment of like duration.
15. SPPA concluded that because Mrs S had not exhausted the standard treatment options, namely treatment with appropriate prophylactic medication under the care of a neurologist, there was a lack of evidence to support the view that she was permanently incapable of performing her role as an advanced nurse practitioner/nurse team leader and therefore did not meet the criteria for an ill health pension.

The Pension Ombudsman's Position on Ill Health Benefits

16. When someone complains that they have not been awarded the ill health (or incapacity) pension that they believe they should have, the Ombudsman reviews the way the decision has been reached.
17. The Ombudsman will not examine the medical evidence and make his own decision based upon it, nor will he ask for additional medical reports. The Ombudsman will consider whether the decision-maker has: (i) taken the appropriate steps in making the decision; and (ii) made a decision that is a reasonable one based on the evidence.
18. 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 one.
19. The Ombudsman will look at whether the decision-maker has followed the scheme's regulations or rules. Different pension arrangements have different regulations or 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 consider whether the right person has made the decision.
20. If the Ombudsman finds that there is an issue in the way in which the decision-maker has reached its decision he will usually determine that it reviews its process and or decision. For example, he may ask the decision-maker to obtain more evidence.
21. The Ombudsman can also consider whether there was any maladministration, such as delay. If he finds that there has been maladministration he may also make an award for non-financial injustice and any related distress or inconvenience.

Adjudicator's Opinion

22. Mrs 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:-

- 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 this case, the relevant Regulations are the National Health Superannuation Scheme (Scotland) Regulations 2011.
- 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 S has said she faces daily struggle as a result of living with her medical condition. However, the Adjudicator was of the opinion that SPPA assessed her IHER application correctly and that it made a reasonable decision based on the available evidence. In particular, SPPA has evidenced that it sought medical advice on Mrs S' conditions, and the likely success of any recommended treatment options, before reaching its conclusions.
- Mrs S' GP is of the opinion that Mrs S' medical condition is long standing and she would continue to suffer from migraines with associated symptoms of dizziness and numbness. However, in order to ensure its decision-making process is reasonable, SPPA need only to consider the GP's comments, it does not have to agree with them.
- SPPA provided evidence to support its argument that the GP's views have been properly considered. In particular, the MA was clearly aware of them and discussed the GP's comments in relation to their own findings. Furthermore, the MA explained why the GP may not be correct and provided evidence to support an alternative position. It was perfectly reasonable for SPPA to have preferred the approach taken by the MA providing that they had properly considered the GP's views.
- Mrs S says that SPPA accepted the MA's advice rather than taking into account the full facts of her case. SPPA needed to consider Mrs S' IHER application in accordance with the Scheme's Regulations and properly explain why her application either can or cannot be approved.
- The Adjudicator was satisfied that SPPA had complied with the Scheme's Regulations and that all relevant evidence had been considered. A difference of medical opinion between the MA's and Mrs S' treating doctors is not sufficient for the Ombudsman to say that SPPA's decision to accept the opinion of the MA, who is an expert in occupational health, was flawed.

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

Ombudsman's decision

24. Mrs S has said that her GP's report explains the severity of her condition and that her migraines are caused by work stress making her too ill to continue in her role. She also referred to her ENT surgeon who has said that the medication could make her symptoms worse, as confirmed by her GP. However, as has been explained by the Adjudicator in her 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. In this particular case, looking at the whole process from the time Mrs S challenged the IHER award, to when SPPA issued its IDRP stage 2 response, I find that it has considered all the relevant facts and followed the procedure correctly. There are no justifiable grounds for me to find that SPPA's decision was perverse, or that the process undertaken to reach its decision, was flawed.
25. Mrs S asserts that there are plenty of Determinations where the Ombudsman has decided that trustees had erred in rejecting an IHER application on the basis of the available medical evidence. Every case is considered on its own merits and it is very hard to draw a comparison between one applicant's circumstances and another's.
26. I do not uphold Mrs S' complaint.

Anthony Arter

Pensions Ombudsman
20 December 2019