

PO-4464

Ombudsman's Determination

Applicant	Mrs C O'Connor
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	Blackburn with Darwen Borough Council (BWDBC)

Complaint summary

Mrs O'Connor has complained that her eligibility for ill health retirement under Regulation 20 of the LGPS (Benefits, Membership and Contributions) Regulations 2007 was not properly considered by BWDBC.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against BWDBC because they failed to consider whether Mrs O'Connor should receive benefits under Regulation 20 in April 2011 in a proper manner.

Detailed Determination

Material facts

1. The relevant regulations are LGPS (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended). Relevant extracts from Regulation 20 can be found in an appendix to this document.
2. Mrs O'Connor was employed by BWDBC as a Customer Services Manager. She was diagnosed with myasthenia gravis in December 2009. She commenced sickness absence in February 2010 and did not return to work.
3. In April 2010, BWDBC asked their then occupational health advisers, Capita Health Solutions (**Capita**), to obtain a report from Mrs O'Connor's specialist. She was asked to sign a consent form in June 2010. Capita wrote to Mrs O'Connor's Consultant Neurologist, Dr Tidswell.
4. Dr Tidswell responded on 16 August 2010 (letter dictated on 26 July 2010). He said that he had first seen Mrs O'Connor in February 2010. Dr Tidswell said that Mrs O'Connor had been experiencing fatigue, ptosis, and neck and limb weakness since August 2009. He outlined her treatment to date and said that, as of May 2010, her symptoms were coming under control. Dr Tidswell outlined the proposed treatment plan and said that relapses might require temporary increases in therapy or the use of alternatives. He said that most patients with myasthenia gravis achieved remission within a year or two of diagnosis and this was likely to be the case for Mrs O'Connor. Dr Tidswell said that the benefits of successful treatment on fatigue were less predictable and remission was not always full. He expressed the view that the main impact on Mrs O'Connor's functional capability at that time was fatigue. Dr Tidswell said that he understood that Mrs O'Connor's occupation was a benefits manager for BWDBC. He said he anticipated that her condition would have improved to the point that she could consider a return to her managerial position "at the end of 2010 or the first couple of months of 2011". Dr Tidswell said that Mrs O'Connor was likely to be on long term medication, "certainly for the next two years and possibly even indefinitely".
5. On 17 August 2010, Mrs O'Connor's GP wrote to Capita. He explained that, in addition to the myasthenia gravis, Mrs O'Connor was suffering from other medical conditions, which he listed. He said that her myasthenia gravis was no better and she was feeling exhausted, had double and blurred vision, speech problems and was experiencing side effects from her medication, including Cushing's Syndrome. The GP said that Mrs O'Connor had good and bad days but, on the whole, she was struggling. He said he could foresee that she would not be able to work in the future because her symptoms were lingering and she required help with day to day tasks.

6. On 23 August 2010, BWDBC wrote to Capita saying that they required them to consider Mrs O'Connor's request to be considered for ill health retirement. They mentioned the report from Mrs O'Connor's GP and that from Dr Tidswell. BWDBC said that Dr Tidswell had focussed on the myasthenia gravis but the treatment Mrs O'Connor was receiving for this was having a serious and debilitating effect on her health. They said they understood that the treatment and, to a certain extent, its impact would be for life. BWDBC said that Mrs O'Connor's GP thought that, in view of the effects of her treatment for myasthenia gravis and her particular medical circumstances, she was unlikely to work again. They said that Mrs O'Connor had indicated that Dr Tidswell thought it would take between two and five years to control her myasthenia gravis and she would need medication for life.
7. BWDBC also asked Mrs O'Connor if she was interested in applying for voluntary redundancy.
8. As required by the LGPS Regulations, Mrs O'Connor's case was referred to an independent registered medical practitioner (**IRMP**). On 9 September 2010, a consultant occupational health physician, Dr Parker, wrote to Capita saying that he had read Mrs O'Connor's file. He noted that she had myasthenia gravis and had been significantly impaired. Dr Parker noted that Mrs O'Connor's GP was of the opinion that she would never work again. He then noted that Dr Tidswell had said that treatment would restore functional capacity. Dr Parker referred to Dr Tidswell's comment that he would anticipate that Mrs O'Connor's neurological impairments would have improved to the point where she could consider a return to her managerial position by the end of 2010 or the beginning of 2011. Dr Parker acknowledged that Dr Tidswell might be being optimistic but said that he had to prefer the opinion of a specialist to that of a GP. He concluded,

"With such an unequivocal view from a specialist in neurology I see little value in seeing Mr (sic) O'Connor myself, and I cannot conclude at this point that she is *permanently* (in LGPS terms) unfit."
9. Dr Parker signed a certificate, on 9 September 2010, stating that, in his opinion, Mrs O'Connor was not, on the balance of probabilities, permanently incapable of discharging efficiently the duties of her employment by reason of ill health.
10. BWDBC met with Mrs O'Connor following Dr Parker's certificate. They said that his certificate and report had indicated that she was not permanently incapable of carrying out her role and was not, therefore, eligible for ill health retirement. At the request of Mrs O'Connor's representative, BWDBC had checked which medical reports had been made available for Dr Parker and confirmed that these included the reports from her GP and Dr Tidswell. They then said that there was no route for Mrs O'Connor to appeal whilst she was still in employment but that she would be able to appeal after her employment ended. With regard to voluntary redundancy, BWDBC noted that Mrs O'Connor was reluctant to apply because she felt that she was eligible for ill health retirement. They said they could not extend the deadline for responses

but that she would not be required to repay her redundancy payment if she was later deemed to be eligible for ill health retirement.

11. Dr Tidswell wrote to Dr Parker on 11 November 2010. He said that Mrs O'Connor was reporting a lot of continuing symptoms which she felt precluded a return to work at the present time. Dr Tidswell said that Mrs O'Connor had responded "only partially and generally temporarily" to a range of immuno-suppressant therapies. He went on to say,

"However I would still be optimistic that in the course of time we will be able to bring her Myasthenia under control and that she should achieve a sustained remission. I think it would be fair to say that I cannot predict with any certainty when this might be. However I have pointed out to her that she has only had symptoms now for about 12 months. I think it is feasible for instance that it might be another 12 months before her disease can be brought under control.

It is also fair to say that she has some other health problems which have been exacerbated by her Myasthenia or its treatment including hypertension and perianal sepsis as well as chronic arthritis. I am also considering the possibility that she has secondary obstructive apnoea syndrome and I am going to investigate her for this."

12. Dr Tidswell wrote to Mrs O'Connor on the same day saying, amongst other things, that restoring her health back to full working capacity remained a realistic goal. He said that most Myasthenia patients achieved a sustained remission of symptoms in due course but it was difficult to estimate when this might be.
13. Dr Parker wrote to Dr Tidswell, on 22 November 2010, explaining what the definition of permanent incapacity was in Regulation 20. Dr Parker said that the correspondence he had on file and Dr Tidswell's recent letter indicated that Dr Tidswell was optimistic that he could bring Mrs O'Connor's Myasthenia under control and she could achieve a sustained remission. Dr Parker said that, in view of this advice, he could not certify that Mrs O'Connor was permanently unfit to return to work.
14. BWDBC and Mrs O'Connor entered into negotiations concerning the termination of her employment under a compromise agreement. In the course of the negotiations, BWDBC informed Mrs O'Connor that she could no longer appeal against the decision not to grant ill health retirement because more than six months had passed since the decision. This was a reference to Regulation 58 of the LGPS (Administration) Regulations 2008 (SI2008/239) (as amended) (see appendix). BWDBC also said that ill health retirement benefits were only awarded when an employer terminated a member's employment on the grounds of ill health. They went on to say that Mrs O'Connor would be eligible to re-apply for ill health retirement in the future. BWDBC recommended that the reason for termination of employment be recorded as capability due to ill health in the compromise agreement in order that Mrs O'Connor might re-apply for ill health retirement.

15. Mrs O'Connor's employment was terminated on 15 April under a compromise agreement which specifically provided that it did not prevent her from "making any application or appeal for ill health retirement under the Pension Scheme". Mrs O'Connor was paid £14,279.72 as "compensation for loss of employment". The compromise agreement stated that Mrs O'Connor's employment was to terminate "[a]s a consequence of [her] ill health and capability for the role".
16. In June 2011, Mrs O'Connor submitted an appeal to Lancashire County Council (**LCC**) (the administering authority) on the following grounds:
 - The only letter/report used in the assessment/decision making process was Dr Tidswell's letter of 16 August 2010 (26 July 2010).
 - This letter had been provided for the purpose of updating her manager on her medical situation and not as evidence in the decision about ill health retirement.
 - The letter had been provided prior to her application for ill health retirement and did not include the most up to date information. It had also been written early on in her condition and, at the time, she was hoping to return to work. Dr Tidswell had been optimistic in his letter because he did not want her to lose her job.
 - Only her GP's letter of 17 August 2010 was an up to date and unequivocal assessment of her condition. Although concise, it gave a more realistic and all round appraisal of her current health.
 - She was experiencing severe fatigue, problems with chewing, swallowing and speech, shortness of breath, blurred and double vision, and often stumbled and tripped. The medication for her myasthenia gravis had caused her to become incontinent. In the last 12 months, she had developed severe arthritis and fibromyalgia for which she was under a Rheumatologist, Dr Ley.
 - Dr Parker had not seen her or contacted her when making his decision. He had based his decision solely on Dr Tidswell's letter and had ignored her GP's letter and her other illnesses and side effects.
 - The arthritis and fibromyalgia on top of the myasthenia gravis had left her very limited in what she could do. She listed a number of problems with everyday living which she experienced.
 - She was registered as disabled and received Disability Living Allowance (**DLA**) at the high rate for mobility and low rate for care. She received Employment Support Allowance (**ESA**) and had been placed in the Support Group.
17. Mrs O'Connor's letter was forwarded to BWDBC. They wrote to her saying that the LGPS Regulations provided for the early payment of deferred benefits on the grounds of ill health and setting out the conditions (Regulation 31). BWDBC said that they would need to arrange for a medical review and asked Mrs O'Connor to complete a consent form.

18. On 29 September 2011, Dr Ford provided a report. He said he had been asked to review Mrs O'Connor's records up to 9 September 2010 and give an opinion on whether she was permanently unfit to return to her job with BWDBC at that time. Dr Ford said that he had considered whether he should interview and examine Mrs O'Connor but concluded that this would not add any useful information to that which was held on file. He said that the question was related to Mrs O'Connor's health in the period up to 9 September 2010 and not to her current health. Dr Ford said that he had taken into account the letters from Mrs O'Connor's GP (dated 17 August 2010) and Dr Tidswell (dated 26 July 2010). He said he had also considered the letters between Drs Parker and Tidswell in November 2010. Dr Ford said that it was clear from Dr Tidswell's letters that he expected Mrs O'Connor to improve sufficiently to return to her post by the end of February or November 2011. He concluded that, on the balance of probabilities, Mrs O'Connor was not permanently incapacitated as at 9 September 2010.
19. BWDBC wrote to Mrs O'Connor on stating that Dr Ford's opinion related to her health as at 9 September 2010 and, on the basis of his opinion, they were not approving the release of ill health benefits from this date.
20. Mrs O'Connor responded querying why up to date information had not been requested or used in her appeal. She also said that she believed she had the right to a further appeal. In response, BWDBC said that Mrs O'Connor had appealed the decision made in September 2010 and this was why no up to date information had been requested. They said that she could apply for the early payment of deferred benefits and up to date medical information would be required for this. BWDBC confirmed that Mrs O'Connor could appeal further.
21. Mrs O'Connor also contacted the Pensions Advisory Service (**TPAS**) for assistance. In response to queries from Mrs O'Connor's TPAS adviser, LCC said that their appeals officer agreed that she should be assessed for ill health retirement as at the date her employment ceased (15 April 2011) and that medical evidence up to that date should be taken into account. They said that they had asked BWDBC to obtain a medical opinion and determine whether ill health retirement was applicable from 15 April 2011.
22. Dr Tidswell wrote to Capita on 4 July 2012. He said that he was treating Mrs O'Connor for seropositive myasthenia gravis for which she did not currently have marked symptoms. He stated the medication Mrs O'Connor was on. Dr Tidswell said that Mrs O'Connor had a "long standing" diagnosis of fibromyalgia which was causing generalised weakness and limb pain. He stated the medication she was on for this. He said that Mrs O'Connor also had erosive osteoarthritis for which she saw Dr Ley and had been treated with steroid injections. Dr Tidswell said that much of Mrs O'Connor's disability at the present time appeared to be related to her fibromyalgia which he described as chronic with an uncertain prognosis. He said that, in most patients, myasthenia gravis symptoms could be controlled but relapses requiring treatment may occur from time to time. Dr Tidswell said that he doubted that there

were further treatments which would result in significant functional improvement. He said that he was not entirely familiar with the evidence base for best treatment for fibromyalgia but noted that Mrs O'Connor had seen a psychologist who did not think that psychological treatment would help.

23. In correspondence with TPAS, Mrs O'Connor said that she had seen Dr Tidswell and he had said that she would not work again.
24. In a subsequent letter to Capita, dated 8 August 2012, Dr Tidswell said Mrs O'Connor's condition in April 2011 was much the same as when he had seen her in May 2012. He said that her symptoms were more those of fibromyalgia than myasthenia. Dr Tidswell said that, given that there had been little change in her condition, he could reasonably say retrospectively that Mrs O'Connor had been incapable of work at the earlier date. He said that he was aware that Mrs O'Connor considered herself unfit for work from at least that date. Dr Tidswell said that Mrs O'Connor had had a "fairly pessimistic" approach throughout the course of her illness with regard to resuming gainful employment. He said that he anticipated that he might be asked if he would have judged Mrs O'Connor to have been permanently incapable of work from April 2011. Dr Tidswell said that the "probably answer" was no because he might still have been optimistic that her symptoms would improve with treatment.
25. Dr Kinoulty, an occupational health physician at Capita, wrote to BWDBC on 23 October 2012. She said that she understood that they required a determination as to whether Mrs O'Connor's condition as at April 2011 would have warranted payment of ill health retirement benefits. Dr Kinoulty said that she had reviewed reports from Dr Tidswell dated 26 July 2010 and 4 July and 8 August 2012, reports from Dr Ley dated 24 April and 23 May 2012, a report from a psychologist, Mr Crawford, dated 24 April 2012 and the GP's letter of 17 August 2010. She said that the latest report from Dr Tidswell provided evidence of Mrs O'Connor's condition as at April 2011. Dr Kinoulty said that he was then optimistic of an improvement in Mrs O'Connor's condition. On that basis, she said that, in her opinion, Mrs O'Connor was not permanently incapable of discharging efficiently the duties of her employment by reason of ill health on 15 April 2011. Dr Kinoulty signed a certificate to this effect. [It has not been possible to obtain copies of the reports from Dr Ley and Mr Crawford because Capita removed these from their systems when BWDBC ceased to be a client of theirs.]
26. LCC issued a stage two appeal decision on 29 January 2013. They said that, following the further review and decision taken by BWDBC, they were not upholding Mrs O'Connor's appeal. LCC referred to the LGPS Regulations and, in particular, the requirement for an employer to obtain a certified opinion from an IRMP. They said that criteria set out in Regulation 20 had been considered by BWDBC following advice from Dr Kinoulty. LCC said that BWDBC had weighed up the evidence taken into account by Dr Kinoulty and had applied the Regulations correctly.
27. Mrs O'Connor subsequently applied for the early payment of her deferred benefits on the grounds of ill health. In connection with the application, Mrs O'Connor saw an IRMP, Dr Hadley, in April 2013. He provided reports on 22 April and 10 June 2013

and a certificate on 10 June 2013. He concluded that all reasonable treatment options had not been exhausted and there was a reasonable possibility that Mrs O'Connor would be in a position to consider a return to work before age 65.

Summary of Mrs O'Connor's position

28. Mrs O'Connor is of the view that BWDBC failed to properly consider her eligibility for the payment of benefits under Regulation 20 as at 15 April 2011. She points out that both Dr Tidswell and her GP have confirmed that she will not work again.
29. Mrs O'Connor feels that the information provided by Dr Tidswell and her GP were ignored. In particular, she feels that the fact that Dr Tidswell changed his opinion as to the likelihood of her working again was not taken into account. Mrs O'Connor has explained that Dr Tidswell has now retired and she is under the care of Dr Nixon.

Summary of BWDBC's position

30. BWDBC say that they sought the advice of an IRMP as required by the LGPS Regulations. They have confirmed that it was not, and is not, their practice to have sight of personal medical records in order to examine, review or challenge an IRMP's professional conclusions. Their understanding is that the employer must assure itself that the IRMP has had access to all the relevant information. They were aware that Dr Kinoultly had seen reports from Dr Ley and Mr Crawford and had, therefore, assured themselves that she had reviewed and professionally commented on all the relevant medical evidence.
31. BWDBC say that Mrs O'Connor left their employment by mutual agreement in April 2011 and received a compensatory payment in full and final settlement of ongoing matters. They say that they did not terminate Mrs O'Connor's employment on the grounds of permanent ill health. BWDBC point out that the compromise agreement stated "any decisions in respect of ill health retirement will be subject to the requirements and the provisions of the Pension Scheme".
32. BWDBC say that there is no dispute that Mrs O'Connor had medical issues prior to leaving their employment. The dispute concerns whether or not Mrs O'Connor met the test for the payment of ill health retirement benefits at that time. BWDBC do not consider that she did.
33. BWDBC say that they are required to have due regard to the LGPS Regulations and associated guidance. They do not consider that it would be a reasonable decision or in line with the Regulations to pay Mrs O'Connor ill health retirement benefits.
34. BWDBC say that Mrs O'Connor's case has now been reviewed by four IRMPs; including the IRMP who reviewed her case for the early payment of deferred benefits. They have provided copies of the fourth IRMP's reports and certificate. They acknowledge that Dr Hadley's reports and certificate were provided in relation to Mrs O'Connor's application for the early payment of her deferred benefits. They say they

may have reconsidered the circumstances of the original decision to refuse the payment of ill health retirement benefits if Dr Hadley had taken the view that Mrs O'Connor met the test for the payment of ill health benefits sometime after April 2011; particularly if the date was close to April 2011. However, Dr Hadley, some two years after Mrs O'Connor left their employment, was of the opinion that the test had not been met. This view is consistent with the other three IRMPs. All four IRMPs have taken account of Dr Tidswell's views over the period 2010 to 2013. BWDBC say that they have asked all the appropriate questions of all four IRMPs.

35. BWDBC have referred to guidance provided by the Department for Communities and Local Government (**DCLG**) dated June 2011. This takes the form of a series of questions and answers. BWDBC point out that, in answer to the question "What happens if the member is unhappy with the employer's decision about an ill health retirement application?", the guidance stated (amongst other things) that the regulations did not provide for appeals before the member's employment was terminated where an ill health pension was not awarded.

Conclusions

36. For Mrs O'Connor to receive benefits under Regulation 20, BWDBC had to determine to terminate her employment on the grounds that:
- ill-health or infirmity of mind or body rendered her permanently incapable of discharging efficiently the duties of her employment with them; and
 - that she had a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age.
37. Before making a decision, BWDBC were/are required to seek an opinion from an IRMP. However, the decision remains for BWDBC to make. They were/are not bound by the IRMP's opinion and were/are required to consider Mrs O'Connor's eligibility themselves before coming to a decision.
38. It is clear that BWDBC had given some thought to the reports provided by Dr Tidswell and Mrs O'Connor's GP prior to referring her case to Capita in 2010. Dr Tidswell had suggested that Mrs O'Connor might be able to return to her former post at the end of 2010 or the beginning of 2011. Her GP was less optimistic and expressed the view that she would not be able to work in the future. Dr Parker saw both reports before giving his opinion. He acknowledged that Dr Tidswell might be being optimistic but said that he had to prefer the opinion of a specialist to that of a GP.
39. Mrs O'Connor has made the point that Dr Tidswell did not provide his report in the context of ill health retirement. I do not find that this means that it was inappropriate for Dr Parker to take it into account in giving his opinion. The question of whether or not Mrs O'Connor would be able to return to work was relevant to Dr Parker's opinion. Mrs O'Connor has also said that the report was written prior to her application for ill health retirement and did not include the most up to date information. She has suggested that Dr Tidswell was being optimistic because he did not want her to lose

her job. However, the opinion Dr Tidswell expressed in the report of August 2010 is not very different to that which he gave in November 2010 directly to Mrs O'Connor herself. Mrs O'Connor has suggested that Dr Parker ignored her GP's report, which she has said gave a more realistic appraisal of her condition. It is not the case that Dr Parker ignored the GP's letter; rather, he gave it less weight than Dr Tidswell's report.

40. BWDBC decided to accept Dr Parker's advice. I have said that BWDBC were not bound by the IRMP's opinion nor should they accept the opinion blindly. However, the weight that they attach to any piece of evidence is for them to decide, including attaching little or no weight to some. They were free to accept Dr Parker's opinion unless there was a cogent reason why they should not. For example, if there were errors or omissions of fact by the IRMP or a misinterpretation of the relevant regulations, BWDBC would be expected to seek clarification before relying on the report. There were no such reasons preventing BWDBC from relying on Dr Parker's advice in reaching their initial decision in Mrs O'Connor's case. I do not find that BWDBC's decision not to award benefits under Regulation 20 in 2010 amounts to maladministration on their part.
41. Having notified Mrs O'Connor that they had decided that she was not eligible for benefits under Regulation 20, BWDBC informed her that there was no option for her to appeal this decision whilst she was still in their employment. This was incorrect. There is nothing in the LGPS Regulations which precludes a member from appealing a decision under Regulation 20 before termination of employment. This amounted to maladministration on BWDBC's part.
42. BWDBC have referred to guidance provided by the DCLG. However, guidance cannot overturn the LGPS Regulations. Regulation 58 of the Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239) (as amended) provided for a member to apply to a specified person for a decision "where there [was] a disagreement about a matter in relation to the Scheme". There were no exclusions. Some degree of confusion may have arisen because Regulation 55 of the same Regulations required an employer to make a decision with regard to a member's entitlement to benefit (which would encompass entitlement to ill health retirement) as soon as was reasonably practicable after the date employment ended. However, in circumstances such as Mrs O'Connor's, where a decision had been made in advance of employment ceasing, Regulation 58 allowed the member to use the process for disagreements.
43. The question is then whether Mrs O'Connor suffered any injustice as a consequence of this error.
44. Had Mrs O'Connor not been told that there was no appeal route available to her, I find it more likely than not that she would have appealed. I note that Dr Tidswell wrote to Dr Parker again in November 2010. He was, at that time, still optimistic about Mrs O'Connor's likelihood of returning to her role. Dr Tidswell was aware that Mrs O'Connor had other health problems but thought that her health could be restored back to full working capacity. It is likely that, had Mrs O'Connor appealed at an earlier

date, this is the opinion Dr Tidswell would have given then. On that basis, it is unlikely that the appeal would have succeeded. In view of this, BWDBC's error in informing Mrs O'Connor that she could not appeal in 2010 did not cause her any injustice.

45. BWDBC and Mrs O'Connor then entered into negotiations for the termination of her employment. These were not concluded until April 2011; some six months after BWDBC had decided that Mrs O'Connor was not eligible for benefits under Regulation 20. The question arises of whether they should have considered her eligibility afresh at that point.
46. Given the fact that Mrs O'Connor had not returned to work in the timescale predicted by Dr Tidswell and was continuing to experience significant health problems, it would have been prudent for BWDBC to review her eligibility for ill health retirement at that point.
47. Mrs O'Connor appealed in June 2011. In addition to her comments regarding the evidence used to reach a decision previously, Mrs O'Connor mentioned that she had developed severe arthritis and fibromyalgia in the last 12 months, for which she was under a Rheumatologist, Dr Ley. I note that these conditions were not mentioned by Mrs O'Connor's GP in August 2010. This is a significant change in Mrs O'Connor's health which would have been relevant to a review of her eligibility for ill health retirement in April 2011.
48. BWDBC referred Mrs O'Connor's case to another IRMP, Dr Ford. He provided a report in September 2011. Dr Ford said that he had been asked to give an opinion as to whether Mrs O'Connor was permanently unfit to return to her job with BWDBC as at 9 September 2010. This was the date of Dr Parker's certificate. In fact, what BWDBC should have asked Dr Ford is whether Mrs O'Connor was permanently unfit to return to her job with BWDBC as at April 2011. This was not addressed until after TPAS had become involved and had approached LCC on Mrs O'Connor's behalf.
49. Dr Tidswell was approached for a further report. He confirmed that he was still treating Mrs O'Connor for myasthenia gravis for which she did not have any marked symptoms at that time. He went on to say that much of Mrs O'Connor's disability, at that time, was related to fibromyalgia. In a subsequent report to Capita, Dr Tidswell specifically addressed the question of Mrs O'Connor's health as at April 2011. He stated that he would probably not have considered her "permanently incapable of work" at that date. He said that he would still have been optimistic that Mrs O'Connor's symptoms would have been improved with treatment.
50. Mrs O'Connor's case was referred to another IRMP, Dr Kinoulty. She wrote to BWDBC saying that she understood that they required a determination as to whether Mrs O'Connor's condition as at April 2011 would have warranted payment of ill health retirement benefits. Dr Kinoulty said that she had reviewed the reports from Dr Tidswell dated 26 July 2010 and 4 July and 8 August 2012, the GP's letter of 17 August 2010 and reports from Dr Ley dated 24 April and 23 May 2012, and a report

from Mr Crawford dated 24 April 2012. The reports from Dr Ley and Mr Crawford would be pertinent to Mrs O'Connor's fibromyalgia.

51. Dr Kinoultly focussed on Dr Tidswell's report of 8 August 2012 because, she said, that provided evidence of Mrs O'Connor's condition as at April 2011. Dr Kinoultly said that Dr Tidswell was then optimistic of an improvement in Mrs O'Connor's condition. On that basis, she said that, in her opinion, Mrs O'Connor was not permanently incapable of discharging efficiently the duties of her employment by reason of ill health on 15 April 2011. However, she makes no mention of the fact that the evidence indicated that Mrs O'Connor was, by then, also suffering from fibromyalgia; the treatment for which Dr Tidswell had himself acknowledged he was not familiar with. BWDBC did not see the reports from Dr Ley or Mr Crawford and, therefore, could not know what, if any, opinions they had given or whether it would have been appropriate to seek further evidence. LCC said that BWDBC had weighed up the evidence taken into account by Dr Kinoultly and had applied the Regulations correctly. It is not clear how they came to this decision when BWDBC had not seen much of the evidence.
52. BWDBC have said that it is not their practice to see medical reports. They consider that they need only assure themselves that any relevant reports have been seen by the IRMP. However, the decision as to Mrs O'Connor's eligibility for benefit is for BWDBC to make. It is for BWDBC to decide what weight they attach to any of the evidence, including giving it little or no weight. They need to be satisfied that the IRMP's opinion is one that they can and should follow. There will be cases where the answer is obvious without the medical evidence being seen. There will be others where it will be appropriate to ensure that the IRMP has reached a medical opinion that is reasonable and takes into account the relevant evidence. .
53. BWDBC say that Mrs O'Connor's case has now been reviewed by four IRMPs and all of them have concluded that she does not meet the eligibility criteria for benefits under Regulation 20. They are including Dr Hadley in that group. I do not propose to go into Dr Hadley's report in any great detail because it relates to the separate decision of whether to pay Mrs O'Connor's benefits early under Regulation 31. That decision is not the matter before me. However, I would say that it is not clear from Dr Hadley's report that he saw Dr Ley's or Mr Crawford's reports either.
54. I do not find that BWDBC have properly considered whether, as at April 2011, Mrs O'Connor was eligible to be paid benefits under Regulation 20. This amounts to maladministration on their part as a result of which Mrs O'Connor has suffered injustice in that her eligibility for benefits has not been properly established. I uphold her complaint on that basis.
55. I also find that the failure to properly consider Mrs O'Connor's eligibility, together with BWDBC's misunderstanding of the appeal process, has unnecessarily prolonged the whole process. This will have caused Mrs O'Connor needless stress and inconvenience for which it would be appropriate for her to receive some modest compensation.

Directions

56. I direct that, within 14 days of the date of my final determination, BWDBC shall refer Mrs O'Connor's case to an IRMP who has not previously been involved with her case for a fresh opinion as to whether she met the Regulation 20 criteria in April 2011. If they are unable to retrieve the reports from Dr Ley and Mr Crawford, they are to take steps to obtain new reports. If they do so, they are to make it clear to Dr Ley and Mr Crawford that they are seeking views as to the situation in April 2011. Any new evidence obtained from Dr Ley and/or Mr Crawford is also to be passed to the IRMP for review.
57. On receipt of the additional evidence, BWDBC must come to a fresh decision as to Mrs O'Connor's eligibility in April 2011. If they determine that they would have terminated her employment under Regulation 20, they will then need to determine the level of benefits they would have paid and arrange for Mrs O'Connor to receive arrears with interest as prescribed under the LGPS Regulations.
58. In addition and within the same 14 days, BWDBC will pay Mrs O'Connor £500 for the stress and inconvenience she has suffered as a result of the maladministration I have identified above.

Tony King

Pensions Ombudsman
19 May 2015

Appendix

Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended)

59. As at the date of Mrs O'Connor's employment ceasing, **Regulation 20** provided,

“(1) If an employing authority determine, ...

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

(b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age ...

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age.

(14) In this regulation –

“gainful employment” means paid employment for not less than 30 hours in each week for a period of not less than 12 months;

“permanently incapable” means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and

““an independent registered medical practitioner (“IRMP”) qualified in occupational health medicine” means a practitioner who is registered with the General Medical Council and —

(a) holds a diploma in occupational health medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA state; and for the purposes of this definition, “competent authority” has the meaning given by section 55(1) of the Medical Act 1983; or

(b) is an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA state.” ...”

**Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239)
(as amended)**

60. **Regulation 55** provided,

“(1) Any question concerning the rights or liabilities under the Scheme of any person other than an employing authority must be decided in the first instance by the person specified in this regulation ...

(6) Any question whether a person is entitled to a benefit under the Scheme must be decided by the employing authority which last employed him ...”

61. **Regulation 58** provided,

“(1) This regulation applies where there is a disagreement about a matter in relation to the Scheme between a member (or an alternative applicant) and an employing authority or the administering authority ...

(3) The member or, as the case may be, the alternative applicant may apply to —

(a) the person specified under regulation 57(5)(c) to give a decision on the disagreement;
or

(b) the appropriate administering authority for that authority to refer the disagreement to that person for a decision.

(7) An application must be made before the end of —

(a) the period of six months beginning with the relevant date; or

(b) such longer period as the person giving the decision on the disagreement considers reasonable.

(8) The relevant date is —

(a) in the case of a disagreement relating to a decision under regulation 55, the date notification of the decision is given under regulation 57; and

(b) in any other case, the date of the act or omission which is the cause of the disagreement or, if there is more than one, the last of them ...”