PO-5037

Ombudsman's Determination

Applicant	Ms Theresia Benker
Scheme	Local Government Pension Scheme
Respondent(s)	Greater Manchester Pension Fund (**GMPF**)
	London Community Rehabilitation Company (**LCRC**)

Complaint summary

Ms Benker has complained about the decision reached in 2012 not to award her an ill health pension as from 2007, when her employment was terminated.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against GMPF because it has no involvement in deciding as to whether or not Ms Benker meets the criteria for an ill health pension from the Scheme.

The complaint should be upheld against LCRC but only to the extent of non-financial injustice Ms Benker has suffered.

Detailed Determination

Regulations

1. Regulation 27 of The Local Government Pension Scheme Regulations 1997 (as amended) (**the Regulations**) provides:

> "(1) Where a member leaves a local government employment by reason of being permanently incapable of discharging efficiently the duties of that employment or any other comparable employment with his employing authority because of ill-health or infirmity of mind or body, he is entitled to an ill-health pension and grant.
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> The pension and grant are payable immediately.
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> …
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> "permanently incapable" means that the member will, more likely than not, be incapable, until, at the earliest, his 65th birthday."

2. Regulation 31 provides for early payment of deferred retirement benefits as follows:

> "(6) If a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body-
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> (a) he may elect to receive payment of the retirement benefits immediately, whatever his age, and
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> (b) paragraphs (2) and (4) do not apply."

3. Regulation 97 sets out who makes the decision regarding IHER, as follows:

> "(1) Any question concerning the rights or liabilities under the Scheme of any person other than a Scheme employer must be decided in the first instance by the person specified in this regulation.
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> (2) Any question whether a person is entitled to a benefit under the Scheme must be decided -
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> (a) …
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> (b) in any other case by the Scheme employer who last employed him.
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> …
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> (9) Before making a decision as to whether a member may be entitled under regulation 27 or under regulation 31 [early access to deferred benefits] on the ground of ill-health or infirmity of mind or body, the Scheme employer

must obtain a certificate from an independent registered medical practitioner who is qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body.

(9A) The independent registered medical practitioner must be in a position to certify, and must include in his certification a statement, that-

(a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the member, the Scheme employer or any other party in relation to the same case. …"

Material Facts

4. Ms Benker was employed by LCRC as a probation officer. Her employment ended on 10 January 2007 following a lengthy period of absence.

5. LCRC was known as the National Probation Service London and previously as the London Probation Trust. To simplify matters, throughout this document I shall refer to it as LCRC.

6. The section of the Scheme of which Ms Benker is a member was managed by the London Pension Fund Authority (**LPFA**). The management of this section of the Scheme was taken over by GMPF.

7. In a letter to LCRC of 10 November 2006 from Dr Allison of Health Management Ltd, LCRC's occupational health advisers at that time, he said that he did not expect Ms Benker to return to work in the foreseeable future but as she had not exhausted all evidence based treatment, it would be early to say that she would be permanently unfit to return to her normal duties.

8. Shortly before Ms Benker's employment ended with LCRC, it obtained an opinion from Dr P Simpkin, a consultant staff physician, on whether she was eligible for an ill health pension from the Scheme.

9. In his letter of 9 January 2007, Dr Simpkin concluded that on the evidence available, and on the balance of probabilities, he would not regard Ms Benker as being permanently unfit for work as a probation officer. He said that she had been referred in the last month to a clinical psychologist and was due to start cognitive behaviour therapy. Consequently, he did not regard her as being eligible for an ill health pension under the rules of the Scheme. He said that for the present she was unfit to resume her employment, but he could not see what adjustments could be made which would enable her to resume work in the foreseeable future.

10. On 17 January 2007, LCRC wrote to Ms Benker informing her that her employment was being terminated on grounds that she was not capable of delivering her role due to ill health. It added that having made the decision to terminate her employment, it considered whether she could be awarded ill health retirement from the Scheme. It said that the occupational health adviser did not consider that a recommendation for ill health retirement could be made without adequate evidence that she was permanently incapable of returning to work in her current role.

11. In April 2007 Ms Benker appealed against her dismissal. One of the grounds of appeal was LCRC's failure to allow her sufficient time to complete her Cognitive Behavioural Therapy. Her appeal was not successful. She was informed at the time that if she wished to appeal the decision of LCRC not to grant her ill health retirement from the Scheme, she could appeal to LPFA.

12. In June 2008, Ms Benker appealed against the decision by LCRC not to grant her ill health retirement from the Scheme.

13. In October 2009, Ms Benker was asked by LCRC to see an independent occupational health adviser as part of the appeal process.

14. On 21 October 2009, the human resources adviser at LCRC wrote to Ms Benker referring to a telephone conversation and confirming that the appointment with the independent occupational health adviser had been cancelled. The reason for the cancellation was because Ms Benker was awaiting a report from her psychiatrist. Ms Benker was told to let LCRC know when she received the report and a further appointment with the occupational health adviser would be arranged.

15. In August 2010, Ms Benker sent a copy of a report from her psychiatrist to LCRC. Her covering letter was headed "ILL HEALTH RETIREMENT APPLICATION". On 27 August 2010, LCRC wrote to Ms Benker referring to her ill health application dated 4 August 2010. She was informed that Dr Allison had requested a consent form to allow further information to be obtained from her GP so that her application could be progressed.

16. In a letter of 3 September 2010 from Dr Laurence Boakye of Health Management Ltd to LCRC, he confirmed receipt of the consent form completed by Ms Benker and a report from her specialist in July 2010. He said that there was enough information to assess her case and recommended that an appointment with one of their regional occupational physicians should be arranged.

17. In September 2010, LCRC wrote to Ms Benker asking her to attend an appointment on 28 September 2010 with Dr Allison.

18. In his report of 1 October 2010, Dr Allison concluded that, in his view, Ms Benker's condition was such that she would be unable to return to her post as a probation officer. In addition, he was also of the view that she was not medically fit to work more than 30 hours per week. He said that in his view she met the criteria for a tier one

benefit from the Scheme. However as he had been involved in her occupational health assessment in the past, he could not make a formal decision about ill health retirement and was referring the matter to a colleague.

19. In October 2010, Dr David Slavin of Health Management Ltd reviewed Ms Benker's case and completed an ill health declaration. The declaration required Dr Slavin to answer yes or no to the question as to whether Ms Benker was, on the balance of probability, permanently incapable of discharging efficiently her duties by reason of ill health or infirmity until, at the earliest, age 65, and that she had a reduced likelihood of obtaining gainful employment before age 65. He did not answer yes or no, but went on to complete the next section agreeing that she should be awarded a tier one pension.

20. In a letter dated 26 January 2011, in response to an email from LCRC, Dr Slavin stated that when Ms Benker was assessed in 2007 it was not apparent that her condition was likely to be permanent and that despite relevant therapies she was no better. Dr Slavin added that he could only give an opinion as he currently saw it. He believed that when he reviewed the paperwork, he formed the view in 2010 that her condition was permanent and this was the date to be used.

21. In March 2011, Ms Benker wrote to LPFA saying that her claim for an ill health pension had been treated as retirement from a deferred status rather than an appeal against the original decision not to grant her ill health retirement.

22. After an exchange of correspondence between Ms Benker, LPFA and LCRC, LCRC said that it was arranging for her to be assessed by an independent occupational health adviser.

23. On 8 December 2011, Dr Jayne Moore of RPS Business Healthcare Ltd, LCRC's new healthcare advisers, wrote to LCRC saying that she had looked at the paperwork for Ms Benker and the assessment process had been appropriate and considered. She said that at the time the decision was made in 2007, Ms Benker did not fulfil the criteria as she had not been through all evidence based treatments for her condition. Without all evidence based treatments having been tried, permanence could not be established. By the time of the assessment in 2010, Ms Benker had accessed these treatments and not gained benefit from them. It was at this time that she could be regarded as permanently disabled.

24. LCRC sent copies of Dr Moore's report of December 2011 to both Ms Benker and LPFA. LCRC told Ms Benker that Dr Moore's report supported the original decision that her pension should only be paid from 15 October 2010.

25. On 20 December 2011, LCRC informed Ms Benker that there was a second stage in the appeal process and if she wanted to take up this right she should write to LPFA.

26. In July 2012, in response to an enquiry from LCRC, Dr Moore reported as follows:

> "Her diagnosis is Post Traumatic Stress Disorder. You will also be aware that the National Institute of Clinical Excellence brought out guidance on the treatment of Post Traumatic Stress Disorder in 2005.
>
> The guidance is that trauma focused cognitive behaviour therapy should be offered to all those with severe post traumatic stress symptoms or with severe PTSD promptly after diagnosis. All people with PTSD should be offered a course of trauma focused CBT or eye movement desensitisation and reprocessing provided on an individual basis.
>
> At the time of leaving employment she was on the waiting list for cognitive behaviour therapy and therefore this treatment was available and there was a hope that this would be effective. She also had not been referred to any formal specialist in Mental Health care.
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> She had had 40 weeks of counselling in 2005 and 2006.
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> She had cognitive behaviour therapy in primary care focussing on panic attacks and depression from January 2007 to August 2007. She was referred to a specialist in mental health and was seen in March 2008. The outcome of this consultation was a change in her medication and a referral to the post traumatic stress service. She was placed on the list for individual trauma focused therapy and had EMRD from September 2008 to August 2009.
>
> As you can see from the details given above there were definite therapeutic options that had not been undertaken at the time of her termination of employment in January 2007. These were subsequently accessed and unfortunately have not been successful leading to the later awarding of the Pension [sic]."

27. In August 2012 LCRC asked Dr Moore:

> "1. Were there available treatments with a reasonable chance of success available at the time Ms Benker left employment. If ill-health was likely (on the balance of probabilities) not to be permanent if those treatments were successfully undertaken, then it would be possible to reach a conclusion that it was correct not to be treated as a permanent ill-health retirement at the relevant time.
>
> 2. If however there was no reasonable prospect, again on the balance of probabilities, of the available treatments succeeding then it would be reasonable to confirm ill-health retirement at the appropriate tier. It may also be possible to even defer a final decision for a period of time if further evidence of effectiveness needed to be considered."

28. Dr Moore responded on 15 August 2012 saying that at the time of the 2007 decision the treatment was available, but was subject to an NHS waiting list. It was hoped that these treatments would be effective and that the ill health was unlikely to be permanent.

29. On 5 September 2012, LPFA wrote to Ms Benker giving her a decision under the second stage process. The decision was that they could find no reason to disagree with the original decision made under stage one.

Summary of Ms Benker's position

30. Her concern when she appealed was to obtain further reports on the basis that any further assessment should be based on full information, which she does not believe to be the case in January 2007. She sent a copy of her psychiatrist's report, but this was not forwarded on to the occupational health adviser assessing her case.

31. In April 2007 LCRC took a definite view that the permanency criterion was fulfilled stating this was based on the contents of a report written two months prior to her dismissal. No medical or other evidence had conflicted with this as at 7 October 2010. It was therefore either wrong not to allow for deferral and reassessment in April 2007 on this basis, or wrong not to allow a tier one ill health retirement benefit following a section 27 appeal initiated in 2008, following assessment in 2010.

32. Dr Allison was only asked to assess her current and future employability. In his report of 10 November 2006 he said that she was unlikely to return to her normal job and that he did not expect her to be able to return to work in the foreseeable future. He then said that she had not had all available treatments and consequently he could not recommend her for ill health retirement at that stage. Were it not for the expressed understanding that assessment/recommendation can only be made after treatment, she would suggest his comments taken together could be regarded as a statement of permanent incapacity.

33. An appeal was launched by her union in April 2007. One of grounds of the appeal was the failure of LCRC to allow sufficient time for her to complete her treatment under the Cognitive Behaviour Therapy. A request was made to defer decisions regarding permanence of incapacity until completion of the 12 week programme which had commenced in January 2007. The appeal requesting deferral was unsuccessful because it was regarded that the permanence criterion had been met.

34. Following the assessment appointment of 28 September 2010, Dr Allison formed the view that she met the criteria for a tier one benefit under the Scheme. A further report was prepared by Dr Emslie on 7 October 2010 and she was advised of this decision by LCRC in a letter dated 12 October 2010. She was informed that the relevant forms had been completed and forwarded to LPFA for processing and after that she received an outline of tier one ill health retirement benefits. It was therefore

reasonable for her to believe that her appeal under regulation 27 was successfully concluded with an award of a tier one benefit.

35. It is not evident whether Dr Slavin had sight of the reports prepared specifically for the appeal. There is also no evidence of the questions he was asked. However, his reply would suggest that he had not been denied of the requirement to assess outcomes only after treatment has been taken. In addition, he does not cite any worsening of her condition at a point after her dismissal which would have supported deferred benefits. He instead highlights the continuity of her ill-health from before to her dismissal until assessment in 2010.

36. She was unaware until March 2011 that she was being assessed for an ill-health pension from deferred status and not backdated to 2007.

37. No appointment was made in 2011 for her to be assessed by an independent occupational adviser.

38. There is no evidence to suggest that Dr Moore had sight of the reports prepared specifically for the appeal.

Summary of GMPF's position

39. There were some misunderstandings with Ms Benker's case, but it seems that the correct outcome has been obtained.

40. When an ill health pension from active status is being considered, three tiers of pension are possible. Tier one is awarded where the person is found to be permanently incapable of undertaking any gainful employment. When an ill health pension is being considered from deferred status, no tiers apply; the deferred benefits are put into payment if an award is made.

41. In 2007 an application for ill health retirement by Ms Benker was rejected. This meant that she was awarded deferred benefits. Any deferred beneficiary may apply to have her deferred benefits brought into payment on grounds of incapacity. If they are, they are paid without any enhancement and from a current date.

42. In October 2010 Dr Slavin signed the Scheme ill health declaration form to the effect that Ms Benker was permanently incapacitated. The senior HR advisor for LCRC ticked the box for a tier one award.

43. The ill health declaration form prompted a query as to when the benefits were to be paid. Dr Slavin confirmed in his letter of 26 January 2011 that in his view this should be from 2010.

44. Ms Benker appealed and Dr Moore was consulted. Dr Moore supported the view that the benefits should be paid from 2010 rather than 2007.

Summary of LCRC's position

45. The issue of whether Ms Benker's dismissal should be through permanent ill health was considered at the original hearing and again at the appeal.

46. At the original hearing there were two pieces of significant information, provided by separate occupational health professionals, both of which detailed that ill health was not an option at that time. The first was a letter in November 2006 from Dr Allison and the next was a letter in January 2007 from Dr Simpkin.

47. In October 2009 arrangements were made for Ms Benker to be seen by an independent occupational health adviser, but these arrangements were cancelled because Ms Benker was awaiting a report from her psychiatrist. She was notified at the time to let it know when she received the report so that alternative arrangements could be made.

48. In October 2010 Dr Allison advised that he considered Ms Benker had now met the criteria for tier one benefits, but he could not make a formal decision as he had previously been involved in an assessment for her. The matter was referred to Dr Emslie who confirmed that Ms Benker was eligible for tier one ill health retirement.

49. Together with Dr Slavin, it completed the appropriate forms for Ms Benker's medical retirement to commence and these were sent to LPFA.

50. In January 2011 further clarification was sought from Dr Slavin as to the date of commencement of Ms Benker's benefits. Dr Slavin confirmed that it was 2010.

Conclusions

51. In order to be entitled to a pension under either regulation 27 or 31 of the Regulations, Ms Benker had to be permanently incapable of discharging efficiently the duties of her employment, or comparable employment, because of ill-health or infirmity of mind or body. 'Permanently' is defined as until, at the earliest, her 65th birthday. The decision as to whether Ms Benker met these requirements fell to her employer, LCRC, in the first instance. Before making this decision, LCRC had to obtain a certificate from an independent medical adviser.

52. As GMPF were not involved in deciding whether or not Ms Benker met the criteria for ill health retirement, I do not uphold the complaint against them.

53. It is not my role to agree or disagree with LCRC's decision or the prognosis of the medical adviser. My role is to consider whether the correct process has been followed in assessing Ms Benker for an ill health pension. There are some well-established principles which decision makers are expected to follow. Briefly they must:

    - take into account all relevant matters and no irrelevant ones;
    - ask themselves the correct question;

- direct themselves correctly in law (in particular, they must adopt a correct construction of the Rules); and
- not arrive at a perverse decision.

54. Ms Benker was first considered for a pension under regulation 27 in January 2007. I have not seen a certificate completed by a qualified independent registered medical practitioner for 2007. However, there are reports by Dr Allison, in November 2006, and Dr Simpkins, in January 2007, both of which confirm that that Ms Benker was not eligible for ill health retirement. The reason given was because she was waiting to receive further treatments and it would be premature to say that she would be permanently unfit to resume her duties before age 65. This is overstating the evidential test and the correct question was whether, on the balance of probabilities, the treatments once she has had them would or would not be effective.

55. Drs Allison and Simpkins in their reports failed to mention whether the treatments would or would not be effective and therefore asked themselves the wrong question. However in August 2012 Dr Moore confirmed that in 2007 Ms Benker was on a NHS waiting list for treatments and it was hoped that these treatments would be effective. Therefore even though the wrong test was applied in 2006/07, the correct test was applied in 2012.

56. It was decided in 2007 that Ms Benker was not eligible for an ill health pension and she initially appealed this decision in June 2008. However, she decided to postpone her appeal as she was awaiting a report from her psychiatrist.

57. It would appear that there was a misunderstanding when Ms Benker sent her psychiatrist's report in August 2010. She thought that she was resuming the appeal process, but LCRC considered her for ill health retirement under regulation 31, ie an application from deferred status, possibly because her covering letter was headed "ILL HEALTH APPLICATION".

58. Having considered Ms Benker for an ill health pension under regulation 31, both she and LPFA were informed by LCRC that she was being awarded a tier one benefit which is only available under regulation 27. This was clearly an error by LCRC.

59. Ms Benker says that there is no evidence that either Dr Slavin or Dr Moore had sight of the reports prepared for the appeal. In September 2010 Dr Boakye confirmed on behalf of Health Management Ltd that they had received the report of July 2010 from Ms Benker's specialist and had sufficient information to assess her. In December 2011 Dr Moore said that she had reviewed the paperwork. There is nothing that leads me to believe that either Dr Slavin or Dr Moore did not have sight of all the relevant reports when they assessed that her ill health pension should start from 2010 and not 2007.

60. Ms Benker suggests that the comments made by Dr Allison in his report of 10 November 2006 could be regarded as a statement that she was permanently incapacitated. But he said that it would be too early to say that she was permanently unfit to return to her normal duties, so in effect she is disregarding an important part of what he said.

61. In his October 2010 report Dr Allison did conclude that Ms Benker met the criteria for a tier one benefit. However, he could not complete the ill health declaration because he had assessed her in the past. It was Dr Slavin who completed the declaration. She was considered for an ill health pension under regulation 31 even though Dr Slavin had incorrectly indicated on the declaration that she should be awarded a tier one pension.

62. Ms Benker says that she had appealed in April 2007 about LCRC's failure to allow her sufficient time to complete her Cognitive Behavioural Therapy. This appeal was with regard to the termination of her employment by LCRC and not with regard to her ill health retirement benefits from the Scheme. As far as her pension is concerned, the question of entitlement had to be dealt with as at the date her employment terminated (even if Ms Benker considers she should have remained in employment longer).

63. Ms Benker says that in April 2007 LCRC took a definite view that the permanency criterion was fulfilled. I have seen nothing that leads me to believe this. In fact the view at the time was that a recommendation for ill health could not be made, as there was no adequate evidence that she was permanently incapacitated.

64. There were two points at which there were errors in the process. The first was when, in January 2007, the decision was based on the existence of untried treatment, rather than whether the treatment was likely to be successful. That fault has, however, already been put right when LCRC asked for and obtained an opinion on that precise matter in 2012.

65. The second was in 2010 when Ms Benker's application was apparently considered as being from deferred status rather than an appeal against the original decision (yet benefits inconsistent with that were agreed on). In the end, the outcome was a proper one. But Ms Benker was not kept properly informed.

66. For the reasons given above, apart from the maladministration identified in the two paragraphs above, I am unable to find that LCRC took irrelevant matters into account, asked itself the wrong question, misdirected itself in law or arrived at a perverse decision. Therefore, I uphold the complaint but only to the extent of non-financial injustice in the form of distress and inconvenience that Ms Benker has suffered.

Directions

67. I direct that within 14 days of the date of this determination LCRC shall pay Ms Benker £200.

Tony King

Pensions Ombudsman
17 March 2015