PO-12900

Ombudsman's Determination

Applicant	Mrs L
Scheme	Principal Civil Service Pension Scheme (**PCSPS**)
Respondents	HM Revenue and Customs (**HMRC**) (Employer)
	My Civil Service Pensions (Administrator)

Outcome

1. I do not uphold Mrs L's complaint and no further action is required by HMRC or My Civil Service Pensions.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs L has complained that her eligibility for ill health retirement benefits has not been considered in a proper manner.

Background information, including submissions from the parties

Background

4. Mrs L was employed by HMRC until May 2016. She had been on long term sickness absence since June 2015. Her employment was terminated on the grounds of unsatisfactory attendance due to an underlying medical condition.

5. Mrs L is a member of the Alpha Scheme. The relevant rules are contained in the Public Service (Civil Servants and Others) Pensions Regulations 2014 (SI2014/1964) (as amended). Extracts from the regulations are provided in an appendix to this document.

6. Mrs L's application for ill health retirement was declined. The Scheme Medical Adviser (**SMA**) (Health Assured Limited) signed a form, on 2 March 2016, stating Mrs L did not satisfy the criteria for ill health retirement benefits. The SMA also provided a covering report for HMRC. Extracts from this and other medical evidence relating to Mrs L's case are also provided in the appendix.

7. Mrs L appealed against this decision. She said:-

    - Her treatment was ongoing and she was almost on the maximum dose of her current medication, which had serious side-effects.
    - The occupational health assessor, she had seen in December 2015, was not a mental health specialist. He had inaccurately reported that her counsellor believed she would make a full recovery.
    - The SMA had referred to depression but not to post traumatic stress disorder (**PTSD**).

8. Mrs L's case was reviewed by another doctor at the SMA. He provided a report, on 3 May 2016, saying he was unable to uphold the appeal and that he would escalate it to stage two. Mrs L's case was reviewed by another doctor at the SMA, who was of the opinion that further evidence was required. Mrs L was given a three-month timescale to provide additional evidence. This deadline was subsequently extended.

9. Mrs L provided another report from her counsellor. This was reviewed by the doctor who had undertaken the stage two review. She advised that it would be appropriate to escalate the case to an independent medical appeal board. Mrs L's case was then referred to a medical appeal board. The board consisted of a consultant in occupational medicine and an accredited specialist in occupational medicine. They provided a report for HMRC, on 6 February 2017, concluding that Mrs L was not permanently incapacitated from performing her original duties.

Mrs L's position

10. The key points from Mrs L's submissions are summarised briefly below:-

    - The evidence from her counsellor was misinterpreted and she was ignored when she raised this.
    - Her case was not considered by a mental health specialist. The SMA had resorted to reading literature on mental health in order to reach a decision.
    - Guidance relating to ill health retirement states incapacity has to be likely to be permanent; not that it has to be proved.
    - If the SMA was unable to decide if her condition was permanent, a provisional award should have been considered.
    - She understands that medical experts will have differing opinions on PTSD. However, the fact that they have the right to offer an opinion should not detract from fact based evidence on PTSD. She has cited a website relating to PTSD[1]

[1] https://www.psychguides.com/guides/post-traumatic-stress-disorder-treatment-program-options/

and says most such websites will say that, although symptoms can be managed, there is no cure.

- She has done everything available to her to help her symptoms. The only treatment suggested by the SMA was EMDR but she cannot afford this and it is not available through the NHS. Her doctors have advised her that they will not refer her for any more treatment on the NHS because they do not think that other treatment will help and, because she has her symptoms under control, it is an unnecessary expense.

- She feels strongly that it is "the person who has pulled [her] through the worst of [her] illness and is properly trained in PTSD" who should have more standing than other experts.

- She realises that it may be harder to determine longevity in cases involving mental illness. She argues that it is, therefore, more important to look at fact based literature on PTSD and take account of the findings of her therapist.

Adjudicator's Opinion

11. Mrs L's complaint was considered by one of our Adjudicators who concluded that no further action was required by HMRC or My Civil Service Pensions. The Adjudicator's findings are summarised briefly below:-

    - It was not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mrs L's eligibility for payment of benefits under regulation 74. The Ombudsman is primarily concerned with the decision making process. The issues considered include: whether the relevant rules have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted for reconsideration.

    - For Mrs L to have received benefits under regulation 74, the SMA had to have been of the opinion that she had suffered a permanent breakdown in health involving incapacity for employment or total incapacity for employment. If that had been the case, it was then for HMRC to agree to her retirement on ill health grounds.

    - So far as their medical opinions are concerned, the SMA doctors are not within the Ombudsman's jurisdiction. However, if there had been an error or omission of fact on the part of the SMA doctors, HMRC, as the ultimate decision maker under regulation 74, could be expected to seek clarification. It was, therefore, appropriate to review the reports provided by the SMA doctors.

- The reports provided by the SMA doctors indicated that they were aware of the criteria for ill health retirement under regulation 74 and Mrs L's normal retirement age. Dr Evans gave a description of Mrs L's former role in his report. This indicated that he had been provided with appropriate information in order to assess whether she was "incapable of doing [her] own or a comparable job". This information was not contained in subsequent reports but each doctor had access to the evidence from previous reviews. The Adjudicator considered it reasonable to say that the SMA doctors had been appropriately informed as to the nature of Mrs L's duties.

- The SMA doctors agreed that Mrs L had suffered a breakdown in health involving incapacity for employment. However, they did not consider her incapacity likely to be permanent. It was on this basis that they advised that Mrs L did not meet the criteria for benefits under regulation 74. The reason given by the SMA's doctors was that there was treatment as yet untried by Mrs L which they considered likely to result in sufficient recovery for her to be able to undertake her former duties.

- Mrs L disagrees with this view and cites the opinion of her counsellor. Ms Murray-Smith had noted a marked improvement in Mrs L's condition which she attributed to the fact that she was not working in a stressful environment. She recommended that this continue. She subsequently explained that PTSD was a permanent condition but sufferers could reduce their symptoms through therapy. She said certain situations would automatically trigger symptoms again and, in Mrs L's case, confrontation in any form would escalate her symptoms. Ms Murray-Smith said that the work environment was having a huge detrimental impact on Mrs L's mental health. She recommended that, to manage Mrs L's PTSD long term, she should not place herself within any work related environment now or in the future.

- There was clearly a difference of opinion between the SMA doctors, who considered there were treatment options which were likely to enable Mrs L to undertake her former duties, and Ms Murray-Smith, who considered that the way for Mrs L to manage her condition was to avoid the workplace. A difference of opinion was not, in and of itself, sufficient to find that HMRC should have sought clarification of the opinions provided by the SMA doctors. Nor was the fact that the SMA doctors did not agree with Ms Murray-Smith sufficient to find that they had not considered her evidence appropriately. The Adjudicator noted that Mrs L was of the view that Ms Murray-Smith's evidence had been misinterpreted. The evidence indicated that her reports were duly considered by the SMA doctors but they had come to a different view. The Adjudicator acknowledged that the SMA doctors were occupational health specialists, rather than specialists in mental health; unlike Ms Murray-Smith. However, the criteria for benefits under regulation 74 relate to Mrs L's capacity for work. The Adjudicator was of the opinion, therefore, that it was not

inappropriate for the opinions of occupational health specialists to be sought. The treatment options referred to by the SMA doctors were not unreasonable.

- The Adjudicator did not identify any reason why HMRC should not have proceeded with her case on the basis of the opinions provided by the SMA doctors.

- The Adjudicator noted Mrs L had referred to guidance stating the incapacity had to be likely to be permanent; not that it had to be proven. The opinions offered by the SMA doctors were provided on a balance of probabilities basis. The Adjudicator was of the view that this was in keeping with the guidance and the regulations.

- The Adjudicator noted also that Mrs L had referred to the possibility of a provisional award. This is provided for under regulation 75 (see appendix). However, this option only arises if the SMA is unable to form an opinion as to whether the member has suffered a permanent breakdown in health involving incapacity for work. This situation did not arise in Mrs L's case.

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

Ombudsman's decision

13. As noted in the Adjudicator's opinion, it is not my role to review the evidence and decide whether Mrs L should receive a pension under regulation 74. My concern is with determining whether there has been maladministration in the way in which her case has been dealt with by either HMRC or My Civil Service Pensions. Maladministration can take the form of failing to obtain appropriate evidence. However, the weight which is attached to any of the evidence obtained is for the appropriate decision maker to decide.

14. Mrs L's case is largely founded upon her belief that greater weight should have been given to the view expressed by Ms Murray-Smith. I can understand why she might consider the person whom she has been seeing for so long in connection with her condition is best placed to give an opinion on her likely future capacity. However, the PCSPS regulations require an opinion from the SMA. It is only if the SMA is of the opinion that Mrs L meets the incapacity criteria that HMRC can agree she should receive a pension.

15. Where the SMA is not of the opinion that Mrs L meets the relevant criteria, HMRC cannot agree to her receiving a pension. If, on receipt of the SMA's opinion, it becomes apparent to HMRC that there has been an error or omission of fact or a misunderstanding of the regulations, I would expect it to query this with the SMA. However, a difference of opinion between medical practitioners is not sufficient to find

HMRC should have taken any further action having received the SMA's opinion in Mrs L's case.

16. Therefore, I do not uphold Mrs L's complaint.

Anthony Arter

Pensions Ombudsman
24 January 2018

Appendix A

Medical evidence

Dr Evans (SMA), 22 February 2016

17. Dr Evans began by referring to the Scheme rules and, in particular, the definitions for "incapacity for employment" and "total incapacity for employment". He also noted that "permanent" meant until normal pension age, which was 67 in Mrs L's case. He noted Mrs L's role was a cash management policy adviser which involved providing technical advice and liaising with other departments and outside agencies.

18. Dr Evans said he had reviewed the referral documents, a report from Mrs L's GP dated 12 February 2016, an undated report from her counsellor (see below), notes from a consultation with Dr Kithulegoda on 31 December 2015, and notes from an occupational health consultation on 23 July 2015. He then explained the approach he would take in reviewing Mrs L's case, including the effect of future treatment.

19. Dr Evans said the medical evidence indicated that Mrs L was currently unfit for work and he could not identify any adjustments which would enable her to return to work. He said it was likely that Mrs L's condition had given rise to a substantial and long-term adverse effect on normal day-to-day activities. He expressed the view that there was reasonable medical evidence that Mrs L had suffered a breakdown in health involving incapacity for employment. Dr Evans then went on to consider if Mrs L's incapacity for employment was likely to be permanent.

20. Dr Evans noted Mrs L had been treated with antidepressants and psychological therapy. He went on to say, given Mrs L's lack of response to treatment thus far, it was unlikely that she would experience a spontaneous and sustained improvement in her health and capacity for work. He expressed the view that, in the absence of future treatment, her incapacity was likely to be permanent.

21. Dr Evans went on to discuss further treatment options; such as increasing the dose of Mrs L's current antidepressant, alternative antidepressants, combinations of medication, and further psychological input. He noted that Mrs L had not been assessed by a psychiatrist. He thought the outcome of such an assessment would be to identify the most efficacious treatment. Dr Evans said the key consideration was whether the benefit of future treatment was likely to be sufficient to enable Mrs L to undertake her normal role. He noted her GP had felt unable to comment on the likely benefit of further treatment and Dr Kithulegoda had not specifically commented. He noted that the counsellor did not believe Mrs L would make a full recovery. He went on to say,

> "Evidence on the likely benefit of further treatment in this case is therefore somewhat limited. I am therefore guided by the medical literature. This indicates that 80% of individuals with depression experience significant improvement with treatment. I am conscious that [Mrs L] has no previous history of mental health problems. I note she does not exhibit any of the

> features one would normally associate with an adverse prognosis. I therefore think it is likely that the benefits of appropriate treatment, in combination with a suitable rehabilitation programme will, more likely than not, be sufficient to enable [Mrs L] to resume her normal role and provide regular and efficient service in it. There is ample time for such benefits to be realised before [Mrs L] reaches normal pension age, which is some 18 years away. I therefore think it likely that these benefits will be realised before she reaches that date."

Ms Murray-Smith (Counsellor), undated

22. Ms Murray-Smith said Mrs L had come to see her after a traumatic event at her home. She described Mrs L's symptoms and said she had diagnosed Post Traumatic Stress Disorder (**PTSD**). She went on to explain that Cognitive Behavioural Therapy (**CBT**) was usually the best form of treatment for PTSD and this had formed the basis of her sessions with Mrs L. Ms Murray-Smith said Mrs L had initially responded well but she continued to struggle with any form of confrontation. She said people suffering from PTSD take differing amounts of time and will often suffer setbacks along the way. She said this was what was happening in Mrs L's case. Ms Murray-Smith noted there had been a marked improvement for Mrs L in the last couple of months. She considered this change to be due to the fact that Mrs L was not working in a stressful environment and she recommended this continue to ensure she made a full recovery.

Occupational Health Adviser, 23 July 2015

23. The occupational health adviser noted Mrs L was absent from work because of anxiety and depression. She said Mrs L had advised her that she had a chronic condition of anxiety and depression which was normally manageable and that her current absence was due to work related issues. She said Mrs L was under the care of her GP and taking appropriate medication, which had recently been increased. She noted Mrs L was also seeing a counsellor on a regular basis. The occupational health adviser expressed the view that Mrs L was currently unfit to undertake any work but she was fit to attend a management meeting to discuss her situation. She said the long term prognosis for sustained attendance at work was poor.

Dr Steele-Perkins (Accredited Specialist in Occupational Medicine), 3 May 2016

24. Dr Steele-Perkins noted he was to advise on whether Mrs L satisfied the criteria for ill health retirement under the rules of the Alpha Scheme. He then outlined the criteria for "incapacity for employment" and "total incapacity for employment". He noted that "permanent" meant the earlier of Mrs L's state pension age or age 65.

25. Dr Steele-Perkins said Mrs L had not submitted any new evidence in support of her appeal. He said he had reviewed the medical evidence which was considered when Health Assured provided its original advice, together with a statement from Mrs L. Dr Steele-Perkins expressed the view that Mrs L had "suffered a breakdown in health

involving incapacity for employment". He said the key issue was whether Mrs L's incapacity was likely to be permanent. Dr Steele-Perkins went on to say,

> "… In my opinion [Mrs L] does suffer from a post-traumatic type reaction from the events stated and many of her symptoms can be explained by the typical psychological reactions and symptoms related to these events. I note her general practitioner has tried various medications, and she is having counselling. I would concur, in my opinion that in the further untreated state, spontaneous recovery, given the chronicity of the events, is going to be difficult to achieve but I would also concur that the opinion of a consultant psychiatrist, not so much on the diagnosis, but on the different medications available to improve her specific case circumstances, and also the talking treatment of choice, which is either trauma related CBT and eye movement desensitisation reprocessing. With these treatment programmes, evidence indicates that individuals do make a good recovery in the majority of case circumstances, and with a supportive return to work framework and a good person job fit, in my opinion she should be able to sustain her role in to the future, although this may take some time."

26. Dr Steele-Perkins expressed the view that Mrs L had suffered a breakdown in health involving incapacity for employment but this was unlikely to continue until her normal pension age. He said he was unable to uphold her appeal and would escalate it to stage 2, where it would be reviewed by a colleague who had not previously been involved in the case.

Dr Saravolac (Regional Clinician for Scotland), 31 May 2016

27. Dr Saravolac reviewed Mrs L's case at stage two of the appeals process. She began by quoting the criteria for lower tier and upper tier payments and noted permanent meant until normal retirement age, which was age 67 in Mrs L's case.

28. Dr Saravolac expressed the opinion that there was reasonable medical evidence that Mrs L had suffered a breakdown in health involving incapacity for employment. She considered the key issue to be whether this incapacity was likely to be permanent. She said the medical evidence confirmed that Mrs L remained incapacitated for work due to symptoms of impaired mental wellbeing. She also said there was evidence that perceived circumstances within the working environment appeared to impact on the maintenance of Mrs L's symptoms.

29. Dr Saravolac noted Mrs L was under the care of her GP and had attended a counsellor. She noted Mrs L had received medication, which had been altered on a few occasions, and some sessions of CBT. Dr Saravolac referred to a comment by Mrs L's counsellor that there had been a positive change in her symptoms due to the fact that she was not working in a stressful environment. Dr Saravolac noted that Mrs L had not been seen by a psychiatrist.

30. Dr Saravolac said, given the length of time Mrs L had been experiencing symptoms and the lack of response to treatment provided so far, she was unlikely to make a spontaneous improvement. She said it was reasonable to conclude that, in the absence of further treatment, Mrs L's incapacity was likely to be long term. Dr Saravolac expressed the view that not all reasonable treatment options had been explored. She considered it reasonable to anticipate that Mrs L would benefit from referral to a psychiatrist. She said Mrs L was likely to benefit from further tailored psychotherapy, including EMDR and trauma-focussed CBT. Dr Saravolac noted that Mrs L's counsellor was of the view that she could make a full recovery if she remained out of a stressful working environment. She said the dominant feature impacting on the maintenance of Mrs L's symptoms related to her perception of stress related to her working environment. Dr Saravolac said she did not find compelling evidence that Mrs L's ill health could not be resolved with available effective treatment to a level which would allow her to return to her usual employment.

Ms Murray-Smith (Counsellor), November 2016

31. Ms Murray-Smith provided an extended version of her previous report in support of Mrs L's appeal. She expanded on her description of Mrs L's symptoms and provided more information about treatment. She explained that, as the traumatic event was a violent and aggressive confrontation, any form of confrontation would trigger the onset of extreme anxiety. She said Mrs L was very aware of her triggers and was able to put strategies in place to help her cope. Ms Murray-Smith went on to say,

> "Although PTSD is not curable sufferers can reduce many of the symptoms through therapy. However, no amount of therapy takes away the memory of the traumatic event and the anxiety it provokes, and certain situations will automatically trigger this anxiety again, in [Mrs L's] case confrontation in any form will escalate her anxiety and symptoms associated with this.
>
> Talking with [Mrs L] on a weekly basis for over a year it was easy to see that the work environment was having a huge detrimental impact on her mental health. It was a place where [Mrs L] felt uncomfortable and any conflict or confrontation whilst at work escalated her PTSD symptoms. She found it increasingly difficult to deal with her negative and suicidal thoughts. It became clear that there would not be a lessening of symptoms for [Mrs L] whilst she stayed working there …
>
> Through a mixture of the strategies that she learnt through therapy and Mindfulness [Mrs L] is now able to cope better with life and is more relaxed and calmer. She now has her PTSD and related symptoms under control. However, even the thought of returning to a working environment causes anxiety for [Mrs L] as it is a place that [Mrs L] associates with the negative thoughts/feelings.

> PTSD is a permanent condition and I am of the opinion that to manage [Mrs L's] PTSD long term she should not place herself within any work related environment now or in the future as returning to work will undoubtedly have a detrimental effect on her mental health.
>
> Over the past 4 years [Mrs L] has tried many different types of therapy and in combination with medication is now able to lead a more peaceful life free from her anxieties. However in the long term it is important that [Mrs L] continues practising her coping strategies and avoid known triggers that can lead to flashbacks associated with her PTSD."

Dr Cheng (Consultant in Occupational Medicine) and Mr Ryan (Accredited Specialist in Occupational Medicine), 6 February 2017

32. Dr Cheng and Mr Ryan saw Mrs L, on 3 February 2017, as the medical appeal board. They provided a report for HMRC.

33. Dr Cheng and Mr Ryan provided a brief history of Mrs L's condition. They then outlined her functional capacity. Drs Cheng and Mr Ryan said Mrs L should be referred to a consultant-led multidisciplinary psychiatric team to have her medication reviewed and psychological treatment options explored, as per NICE guidelines. They expressed the view that CBT would be beneficial. They said trauma-focussed CBT and EMDR were the first line of treatment and medication was recommended where the condition persisted. Dr Cheng and Mr Ryan said there was no evidence to suggest that Mrs L's psychological condition would not improve with these further treatments. They considered that, on the balance of probabilities, there would be sufficient improvement in Mrs L's condition with the suggested treatment for her to undertake her original duties. Dr Cheng and Mr Ryan referred to a comment from Mrs L that she felt 90% better than she had been at her worst but that she needed to avoid stress to remain that way. They said vulnerability was not a criterion for ill health retirement.

Appendix B

The Public Service (Civil Servants and Others) Pensions Regulations 2014 (SI2014/1964) (as amended)

34. At the time Mrs L's employment ceased, regulation 74 "Entitlement to ill-health pension" provided,

> "(1) An active member of this scheme who has not reached normal pension age under this scheme is entitled to the immediate payment of an ill-health pension under this scheme, in accordance with the provisions of this Chapter, if the conditions in paragraph (2) are met.
>
> (2) The conditions are -
>
> (a) the member or the member's employer has claimed payment of an ill-health pension;
>
> (b) the scheme medical adviser -
>
> (i) is of the opinion that the member has suffered a permanent breakdown in health involving incapacity for employment or total incapacity for employment; and
>
> (ii) gives the scheme manager and the employer a certificate stating that opinion ("ill-health retirement certificate");
>
> (c) the member has at least 2 years' qualifying service; and
>
> d) the employer agrees that the member is entitled to retire on ill-health grounds.
>
> (3) If the member meets the lower tier payment threshold, a lower tier earned pension is payable in respect of the member's continuous period of pensionable service.
>
> (4) If the member meets the upper tier payment threshold -
>
> (a) a lower tier earned pension is payable in respect of the member's continuous period of pensionable service; and
>
> (b) an upper tier top up earned pension is payable in respect of the period that begins when the member becomes entitled to the immediate payment of an ill-health pension and ends when the member reaches prospective normal pension age.
>
> (5) A full retirement added pension of any description is payable with a lower tier earned pension if the full retirement account specifies an amount of full retirement added pension of that description."

35. “Incapacity for employment” and “total incapacity for employment” are defined in regulation 71 as,

> “(a) a member's breakdown in health involves "incapacity for employment" if the scheme medical adviser is of the opinion that, as a result of the breakdown, the member is incapable of doing the member's own or a comparable job; and
>
> (b) a member's breakdown in health involves "total incapacity for employment" if the scheme medical adviser is of the opinion that, as a result of the breakdown -
>
> (i) the member is incapable of doing the member's own or a comparable job; and
>
> (ii) the member is incapable of gainful employment.”

36. The “lower tier payment threshold” is met if (a) the member's breakdown in health involves incapacity for employment; or (b) where the member is partially retired, the member's breakdown in health involves total incapacity for employment.

37. The “upper tier payment threshold” is met if (a) the member is not partially retired; and (b) the member's breakdown in health involves total incapacity for employment.

38. “Gainful employment” is not defined in the regulations but “employment” is said to include an office or appointment.

39. Regulation 75 “Provisional award of ill-health pension” provided,

> “(1) This regulation applies if the scheme medical adviser is unable to form an opinion on the following matters -
>
> (a) whether a member (P) has suffered a permanent breakdown in health involving incapacity for employment or total incapacity for employment;
>
> (b) whether P's breakdown in health involves -
>
> (i) incapacity for employment; or
>
> (ii) total incapacity for employment.
>
> (2) The scheme medical adviser may recommend that -
>
> (a) for a period specified in the recommendation (being a period of not more than 5 years), P is taken to have suffered a permanent breakdown in health involving whichever of the following is specified in the recommendation -
>
> (i) incapacity for employment; or

(ii) total incapacity for employment; and

(b) P's case should be reviewed by the scheme medical adviser at the end of the period specified in the recommendation.

(3) If the scheme manager agrees to the recommendation -

(a) the scheme manager must determine if P meets the lower tier payment threshold or the upper tier payment threshold; and

(b) P is entitled to the immediate payment of-

(i) an ill-health pension in accordance with regulation 74; and

(ii) any full retirement added pension payable with it …"