

**PENSION SCHEMES ACT 1993, PART X**  
**DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN**

<b>Applicant</b>	Mrs Trudy Affleck
<b>Scheme</b>	NHS Pension Scheme (the <b>Scheme</b> )
<b>Respondent(s)</b>	NHS Business Services Authority ( <b>NHSBSA</b> )

**Subject**

Mrs Affleck's complaint which is against the NHSBSA is that her ill health pension should be calculated in accordance with the rules relating to re-employed pensioners.

**The Deputy Pensions Ombudsman's determination and short reasons**

The complaint should not be upheld against NHSBSA because regulation 42 of the National Health Service (Superannuation) Regulations 1980 does not apply in determining Mrs Affleck's 2012 pension entitlement.

## DETAILED DETERMINATION

### Provisions under the relevant regulations

- I. Regulations 8(1), 41 and 42 under the National Health Service (Superannuation)

Regulations 1980 (the **1980 Regulations**) state:

**“8 Officer’s pension and retiring allowance**

(1) On ceasing to be an officer, a person shall be entitled to receive from the Secretary of State –

(a) an annual pension if –

(i) he has completed 2 years’ service and is permanently incapable of discharging effectively the duties of his employment by reason of physical or mental infirmity; or

...

(b)

(iii) for the purpose of determining entitlement to a pension under regulation 8(1)(a)(i), (ii) or (vi) a person may be treated as having ceased to be an officer in respect of one of his employments which has terminated although he continued to be an officer in respect of one other or more employments which were concurrently held with that employment.

...

**41 Separate benefits in the case of certain re-employed pensioners**

(1) Where a person who is entitled to a pension under these or the previous Regulations has become an officer and his pension is on that account liable to be reduced or suspended, then on ceasing to be employed, unless he is person to whom regulation 42 applies, the service in respect of which that pension is granted shall be reckonable for the purpose of determining whether the person is entitled to receive any benefit under these regulations, but for no other purpose.

...

**42 Combined benefits in the case of certain re-employed pensioners**

(1) Where a person who has become entitled to a pension or retirement allowance under these regulations...has again become an officer and at the time of becoming such an officer was not an officer mentioned in regulation 7(2), he may, unless the provisions of regulation 41 have been applied in respect of his previous service as an officer, if he so elects, or has so elected under the corresponding provision of the previous regulations as from the date on which he ceases to be an officer, be entitled to benefits in accordance with the following provisions of this regulation in lieu of any pension to which he has become entitled as aforesaid and of any benefits to which he might otherwise be entitled under these regulations in respect of his service as such officer...”

2. The National Health Service Pension Scheme Regulations 1995 (the **1995 Regulations**) came into effect as from 6 March 1995. Sections C2 and Section V2(3) in Part C and Part V, respectively, of the 1995 Regulations state:

**“C2 Meaning of “pensionable service”**

(1) In these Regulations, “pensionable service” is service which counts both for the purpose of ascertaining entitlement to benefits under these Regulations and for the purpose of calculating them and means, subject to paragraph (2), the aggregate of the following –

...

(2) A member’s pensionable service does not include –

...

(b) in the case of a member who has become entitled to a pension (including a preserved pension) under the scheme, any period that was taken into account for the purpose of determining whether he was entitled to that pension, or for the purpose of calculating the amount of that pension...

...

**V2 Revocations and savings**

(3) Where, prior to the coming into force of these Regulations, any of the following provisions of the previous regulations applied in relation to a member, namely –

...

(d) regulations 40 to 43 (benefits in the case of certain re-employed pensioners);

...

any rights and liabilities relating to that member by virtue of those provisions shall be deemed to continue to apply notwithstanding the revocation of those provisions.”

**Material Facts**

3. Mrs Affleck was a Superintendent Physiotherapist (Post A) when she took early retirement on grounds of ill health on 8 August 1994. She continued to work part-time as a Physiotherapist Advisor (Post B), a post which commenced on 1 September 1993, until 1 April 1996.
4. On 10 September 1994 she commenced a new part-time post (Post C) which was converted to a full-time post when Post B came to an end. She retired from Post C on 11 April 2012 on grounds of ill health.
5. In August 2013 Mrs Affleck complained to NHSBSA that her ill health pension on retiring in April 2012 should be calculated in accordance with the provisions under regulation 42 of the 1980 Regulations and not under the provisions of the 1995 Regulations. She said:
  - The view being taken is that Post B was continuing employment and therefore she did not “cease to be an officer” prior to 5 March 1995 and the provisions under regulation 42 of the 1980 Regulations was not

applicable in her case. In addition, Post C was considered as “additional” employment and not re-employment.

- For the purpose of determining entitlement to further pension under the 1980 Regulations section V2(3) of the 1995 Regulations provides that regulations 40 to 43 of the 1980 Regulations continue to apply.
  - Her ill health benefits in 1994 were determined under regulation 8(1)(a)(i) of the 1980 Regulations which stated that she was treated as having “ceased to be an officer”. Therefore, she ceased to be an officer prior to 5 March 1995 and her subsequent re-employment into Post C meant that in the context of the regulations she “again became an officer”. Regulation 42 of the 1980 Regulations applies where “a person who is entitled to a pension under these or previous Regulations who has again become an officer”. Therefore her entitlement on ceasing employment in 2012 should be determined under regulation 42 of the 1980 Regulations.
6. On 16 October 2013 NHSBSA responded to Mrs Affleck stating that the words “may be treated as having ceased to be an officer” permitted them to ‘deem’ a person as having ceased to be an officer for the purposes of an entitlement to an ill health pension under regulation 8(1)(a)(i) whilst they continue to be an officer (scheme member) in another employment but not for any other purpose, including the provisions of regulation 42. This response was treated as a stage one decision under the Scheme’s internal dispute resolution procedures (IDRP).
7. Mrs Affleck appealed under stage two IDRP. She said:
- At the time she took her pension in 1994 she sought the advice of the pensions officer at Salisbury Hospital regarding the regulations. She was reassured on more than one occasion that taking ill health retirement would not be detrimental to her final pension and it was on that understanding that she took ill health retirement in 1994.
  - For regulation 42 to apply for determining entitlement to further pension in 2012, an officer is:
    - required to be entitled to a pension under regulation 8(1)(a)(i) and
    - required to “again become an officer” whilst the 1980 Regulations remained in force.

In 1994 in accordance with the 1980 Regulations she became entitled to a pension under regulation 8(1)(a)(i). She ceased to be an officer on termination of her contract for Post A and took a break in service. She was then re-employed as a pensioner in a new post - Post C. There was no requirement for her to terminate her contract with Post B due to regulation 8(1)(b)(iii).

- For the purpose of her entitlement to a pension in 1994, she was treated as having ceased to be an officer in respect of one of her employments and her concurrent Post B disregarded. Regulation 8(1)(b)(iii) provides for an officer in concurrent employment with the same entitlement to a pension as an officer in single employment.
- For the purpose of determining entitlement to a pension, an officer in single employment would on termination of contract and break in service be treated as ceasing to be an officer and deemed to have once again to become an officer on subsequent re-employment. Regulation 8(1)(b)(iii) allows an officer in concurrent employment to similarly be treated as ceasing to be an officer in respect of one of their employment. By virtue of that fact, her subsequent re-employment as a pensioner as a consequence of ceasing to be an officer in respect of one of her employments means that she once again became an officer.
- She notes the provisions of regulation 42 of the 1980 Regulations, refer explicitly to officers to whom this regulation does not apply. Officers entitled to a pension under regulation 8(1)(a)(i) are not included and therefore regulation 42 should be applied.
- She believes that in 2012 for the purposes of determining further entitlement to a pension regulation 8(1)(a)(i) should continue to be applied and her pension determined under regulation 42. In 1994 whilst the 1980 Regulations remained in force, she ceased to be an officer as a result of the termination of Post A and as a pensioner she again became an officer, as a result of Post C, in respect of the required one employment.

8. On 7 February 2014 NHSBSA gave Mrs Affleck their decision under stage two IDRP. Their decision was not to uphold her complaint and their reasons were as follows:

- A pension became payable under the 1980 Regulations when someone ceases to be an officer. Generally this would happen if the person has left service. However, if someone held two or more employments concurrently, they could satisfy the requirements by leaving only one employment, while remaining in the second.
- She became entitled to a pension when she retired in August 1994 from her employment as a Superintendent Physiotherapist because of ill health. On the date she retired she continued in a second employment as a Physiotherapy Advisor.
- For benefits to be assessed under regulation 42, it would be necessary for her to have had a break in scheme membership when she held no employments. She had no such break as her continued employment was held concurrently with the employment from which she took retirement. Although she did begin a later employment (Post C), it was also held concurrently, this time with the job in which she had continued when she retired.

9. As the matter could not be resolved with NHSBSA, Mrs Affleck brought her complaint to me.

### **Summary of Mrs Affleck's position**

10. Her assertion is not that she previously ceased to be an officer in 1994, but that the regulations allowed her to be treated as if she ceased to be an officer in 1994 and therefore, as a re-employed pensioner, she is entitled to a further pension under regulation 42.
11. It is inconsistent and contradictory that, for the purpose of entitlement to an ill health pension, in 1994 she could be treated as if she ceased to be an officer regardless of concurrent employment but in 2012, again for the purpose of entitlement to an ill health retirement pension, she is treated as if she did not cease to be an officer because of the same concurrent employment.

12. NHSBSA say that it is their understanding of the regulations, although this understanding has not been supported by reference to any further regulations or guidelines. She did question NHSBSA on their interpretation and application of the regulations and they have amended their original interpretation and application.
13. She fully appreciates that her employment history with concurrent employment in 1994 means that she did not actually cease to be an officer in 1994, and were it not for 8(1)(b)(iii) of the 1980 Regulations she would not have been entitled to an ill health pension in 1994. The question is whether by being awarded a pension in 1994, requiring that she ceased to be an officer, regulation 8(1)(b)(iii) continues to have application for the award of a further pension in 2012.
14. She has accepted two separate payments of £100 as compensation for the maladministration she experienced. However, since then she continued to experience ongoing maladministration and misinterpretation of the regulations by NHSBSA.

#### **Summary of NHSBSA's position**

15. When Mrs Affleck retired from her post in 1994, she became entitled to an ill health pension under regulation 8(1)(a) of the 1980 Regulations. The words "may be treated as having ceased to be an officer" under this regulation permits them to 'deem' a person to have ceased to be an officer for the purposes of an entitlement to an ill health pension under regulation 8(1)(a)(i) while they continue to be an officer (scheme member) in another employment, but not for any other purpose, including the provisions of regulation 42 that caters for the calculation of retirement benefits for re-employed pensioners.
16. For benefits to be assessed under regulation 42 a break in Scheme membership when no other NHS employments are held is required. She did not have such a break.
17. They accept that under stage one IDRP, conflicting and incorrect information had been given and this part of her complaint was upheld and an ex-gratia payment of £100 for distress and inconvenience was sent to her. When stage two IDRP was completed in August 2012 the ex-gratia payment for distress and inconvenience was increased by a further £100.

## Conclusions

18. The matter I need to consider is whether regulation 42 of the 1980 Regulations applies in determining Mrs Affleck's ill health pension entitlement in 2012.
19. When Mrs Affleck retired in 1994 she became entitled to an ill health pension under the 1980 Regulations. When she retired in 2012, her pension was dealt with in accordance with the provisions of the 1995 Regulations.
20. Under section C2(2)(b) of the 1995 Regulations, the pensionable service used to calculate Mrs Affleck's pension in 1994 cannot be used to calculate her entitlement in 2012. However section V2(3) says that regulations 40 to 43 of the 1980 Regulations continue to apply notwithstanding the revocation of the 1980 Regulations, but these regulations will only apply if they were applied before 9 March 1995, i.e. while the 1980 Regulations were still in effect.
21. Regulations 41 to 43 of the 1980 Regulations only apply to officers "re-employed" after they became pensioners. Mrs Affleck's employment in Post B commenced before she took ill health retirement from Post A in 1994, continued after the date Post C commenced and ended in April 1996. For Post B to be considered as re-employment, she would have had to commence employment in this post after she had retired from Post A and not before. Therefore, Post B cannot be considered as re-employment.
22. Post C commenced while Mrs Affleck was still employed in Post B. For regulation 42 to apply to Post C her employment would have to end before 9 March 1995 and there would also then have to be a period of unemployment before re-employment. Employment in Post C ended in April 2012 and there was no break in employment before re-employment. Therefore Post C cannot be considered as re-employment.
23. Mrs Affleck has questioned whether regulation 8(1)(b)(iii) of the 1980 Regulations continues to have application for the award of a further pension in 2012. Regulation 8(1)(b)(iii) states that it applies for the purpose of determining a pension under regulation 8(1)(a)(i), (ii) or (vi). Her pension in 2012, as previously stated, is dealt with under the provisions of the 1995 Regulations and therefore regulation 8(1)(b)(iii) does not apply.



24. For the reasons given above, I find that regulation 42 does not apply in determining Mrs Affleck's ill health pension entitlement in 2012 and therefore I do not uphold the complaint against NHSBSA.

**Jane Irvine**  
Deputy Pensions Ombudsman

13 October 2014