PO-7267

Ombudsman's Determination

Applicant	Mrs L
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondents	Rotherham Metropolitan Borough Council (**the Council**)
	South Yorkshire Pensions Authority (**SYPA**)

Outcome

1. Mrs L's complaint is upheld against the Council. To put matters right the Council should reconsider Mrs L for ill health retirement at the date her employment ended in November 2012 and pay her £500 for the distress and inconvenience caused.

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

Complaint summary

3. Mrs L's complaint is that she has been refused ill health retirement.

Background information, including submissions from the parties

4. Mrs L was employed by the Council as a full time Admin Supervisor and Quality Co-ordinator.

5. Following a L4/5 spinal fusion for chronic mechanical back pain Mrs L underwent a revision because of problems with the screws in May 2009. She continued to have pain and was told in 2011 that there was nothing more surgically that could be done.

6. Following a period of sickness absence Mrs L was considered for ill health retirement.

7. Regulation 55(6) of The Local Government Pension Scheme (Administration) Regulations 2008, requires the Council, as the employing authority, to decide, after obtaining the certified opinion of an independent registered medical practitioner (**IRMP**), whether Mrs L satisfied the eligibility criteria, under regulation 20 of the Local Government Pension Scheme (Benefits, Membership, Contributions) Regulations 2007, for ill health retirement from active status.

8. The Council were not bound by the IRMP's opinion and were required to come to a decision of their own based upon a review of all the available relevant evidence. It

was open to the Council to accept the IRMP's opinion unless there was some cogent reason why they should not, such as an error or omission of fact or a misunderstanding of the relevant regulations.

9. To qualify under regulation 20 of the 2007 Regulations, t (an extract is provided in the attached Appendix, Mrs L must pass a two-stage test. On the balance of probability:

- she must be permanently (that is to age 65) incapable of discharging efficiently the duties of her employment with the Council; and
- have a reduced likelihood of undertaking any gainful employment (paid employment of not less than 30 hours per week for a period of not less than 12 months) before her normal retirement age.

10. Dr Senior (Consultant Occupation Physician), who completed the occupational health section of Mrs L's application, wrote to the Council on 9 December 2011. She said:

> "The clinical examination confirms that she has significant back pain, to the point that the back is unlikely to improve in the foreseeable future."

11. Dr Williams (IRMP) considered reports commissioned from Mr Howard (Consultant Orthopaedic Surgeon) and Mr Bosma (Consultant Spinal Surgeon) dated 2 November 2011.

12. In his August 2011 report, which included a summary of medical records from May 2008 to May 2010, Mr Howard said:

- Despite surgery, pain management and injections Mrs L continued to have "significant severe low back pain".
- Despite extensive investigation he had been unable to identify a specific problem that would be amenable to further surgical intervention.
- On fitness for work, it was clear that Mrs L was going to continue with significant low back symptoms which would give her significant impairment and disability both in terms of day to day life and in the workplace.
- It was unlikely that anything further could be done to improve this situation.

13. In Mr Bosma's report dated November 2011, concerning the one time he saw Mrs L in May 2010, he said:

> "Diagnosis at the time of consultation certainly was failed back syndrome. Given the way she was affected at the time I would not think that she would be fit for work at that time. I had personally not planned any further interventions, but, as said, had suggested that she should be referred for an in-house pain rehabilitation programme if at all possible.
>
> The prognosis is reserved and I doubt that she would be in a position to continue working particularly with a sedentary – because of prolonged sitting – or a heavily physical job."

14. Dr Williams certified that Mrs L was not permanently incapable of discharging efficiently the duties of her employment on grounds of ill health. In his full report to Dr Senior, amongst other things he said:

    - It was most unhelpful to call Mrs L's persisting back pain as 'failed back syndrome'.
    - Her back was stable and fully healed and there was no evidence that any structure within the spine was causing her symptoms.
    - The best treatment for back pain was activity. Rest would make things worse.
    - Currently there was no objective evidence for any pathology that would prevent her from returning to her normal duties.
    - She was able to work 20 hours a week and there was no reason why she should not be able to increase this to full time in the future.
    - Without clear evidence of pathology he was unable to state that she was permanently unfit for her role.

15. In his shortened report to the Council Dr Williams said:

    "[Mrs L] has a history of back pain which was treated surgically, but the pain has persisted. There is no evidence for any underlying pathology that would be expected to cause her pain, and if she were to increase her levels of activity her symptoms would be expected to improve. She may well benefit from help and support to achieve this, mostly because initially increasing activity is likely to lead to pain. As there is no clear pathological cause, I cannot state she is permanently unfit for her role, and I cannot therefore recommend early payment of pension benefits under ill health retirement."

16. On 4 January 2012, the Council notified Mrs L that they had to be guided by the IRMP's opinion and therefore her pension could not be released on grounds of ill health.

17. Two days later Dr Senior wrote to Dr Williams strongly disagreeing with the decision. Dr Senior agreed that the evidence showed that there was no underlying pathology but was of the opinion that Mrs L did have chronic pain syndrome regional to her back and was severely disabled because of it.

18. Mrs L appealed submitting several documents, including three reports from Mr Howard dated 3 February, 1 March, and 5 March 2012.

    The 3 February report noted:

    - A significant deterioration in Mrs L's condition since last seen 18 months previously.
    - She had undergone a lot of pain management treatment with no significant benefit.

- Clearly she had a significant chronic pain syndrome causing her a very high level of impairment and disability, but there was no specific diagnosis for her symptoms.
- Recommended an independent evaluation from a chronic pain management specialist.
- Currently it was unlikely that she would get back to work in the future.

The 1 March report noted:

- X-rays and scans of Mrs L's back did not explain the level of her symptoms, impairment and disability. Her spinal fusion was well formed.
- Surgical intervention could not be considered without a specific pain source identified.
- Whatever the reason for her pain it was unlikely that it would settle appreciably further in the short or medium term.

The 5 March report was addressed to Legal & General (in respect of a separate Total and Permanent Disability claim that Mrs L had made). Amongst other things Mr H said:

> "I think it is perfectly reasonable for [Mrs L] to go through pain management and rehabilitation programme which should help her manage her symptoms rather more effectively but I do not think given the amount of time that has elapsed and the severity of her symptoms that she will get back to her normal occupation.
>
> Although we are unable to precisely identify the cause of [Mrs L's] symptoms it appears clear to me in her current condition, which I think is unlikely to change significantly further, she will be unfit for even sedentary employment in the long term."

19. Subsequently a 'To Whom It May Concern' report was submitted from a Clinical Nurse Specialist (Chronic Pain Service) dated 14 March 2012. The report said:

- Mrs L's treatment at the Pain Clinic had included: Butrans, Codeine, TENS, Physiotherapy and had received some caudal adhesiolysis.
- While she had not been seen at the Pain Clinic for a number of years given the nature and cause of her chronic pain Mrs L would have ongoing pain and associated disability as a result.

20. The Council obtained a report from Mrs L's Physiotherapist, Ms Hardy. Commenting on Mrs L's present condition and prognosis Ms Hardy said:

- Mrs L was suffering from severe chronic pain which had failed to respond to any form of treatment.
- She was severely limited in basic activities of daily living and basic mobility and despite numerous different approaches nothing had helped her.

- It was unlikely that her condition would improve. Further physiotherapy was futile considering her past failed treatments.
- She was unable to work at present and considering that her attempt at a phased return to work was impossible it was unlikely that she would be able to work again in the future.

21. In July 2012, Dr Oliver (IRMP) certified that Mrs L was not permanently incapable of discharging efficiently the duties of her employment on grounds of ill health. In his full report to Dr Senior, amongst other things he said:

    - Mr Howard's most recent clinic notes underlined that no specific pathology had been identified to explain Mrs L's ongoing level of impairment and disability.
    - There remained no objective medical evidence to support permanent incapacity.
    - Mrs L had managed to return to her duties, albeit on reduced hours for 15 months.
    - Her current diagnosis was Chronic Pain Syndrome. This referred to persistent pain that usually had no identifiable source and was associated with abnormal illness behaviours including self-limitation of social and recreational activity and self-perception of occupational disability. With help to modify her behaviour towards her pain symptoms the hope remained that Mrs L could resume her substantive role before age 65.

22. In his shortened report to the Council Dr Oliver said:

    "[Mrs L] has ongoing back pain following surgical treatment. There is no objective evidence to explain her ongoing symptoms and associated level of disability. Chronic Pain Syndrome has been postulated as a cause. This is a complex condition which is thought to be related to altered central processing of pain. Therapies to modify pain behaviour may be helpful. At this stage I cannot advise that there is permanent incapacity, i.e. for the next 21 years."

23. Mrs L's employment ended on grounds of capability due to ill health on 25 November 2012. The Council's termination letter informed her that she had a period of 6 months to appeal against the decision to award her preserved benefits instead of an ill health pension.

24. Mrs L invoked the Scheme's two-stage internal dispute resolution (**IDR**) procedure. At IDR stage 1, Mrs L said:

    - Independent medical experts had not reviewed her condition - SYPA regularly used the same medical practitioners, she therefore questioned their independence.
    - The IRMPs were generally trained and not experts in the field of her condition and had not physically examined her.
    - The reports of Mr Howard and Mr Bosma had been overlooked and neither Dr Williams nor Dr Oliver had contacted them.

- The precedence set by Legal & General's decision appeared to have been discounted.
- Her request for a face to face independent assessment, funded by herself, had been denied.
- She had not worked since February 2011, and there was no prospect of her working, therefore she should be eligible for some level of tiered benefits.
- The Council had failed to challenge either IRMP's medical opinion despite being aware of her condition through face to face contact.

25. With her appeal Mrs L submitted reports from Dr Edwards (Consultant in Pain Management) dated 2 April 2013, and Mr Breakwell (Consultant Orthopaedic Spinal Surgeon) dated16 April 2013 - *Mrs L arranged to see Dr Edwards after the Council had declined her request that they or SYPA mutually agree a face to face assessment with an independent physician specialised in her area of debilitation.*

26. Dr Edwards said:

- There was no doubt that Mrs L would not be able to work again due to her "very significant ongoing back pain and disability issues".
- There was no further place for any forms of invasive treatment injections or medication change.
- The only way forward was to look at ways of helping her manage her very difficult pain problem more effectively. While this may improve her quality of life by looking at appropriate aides and ways of getting her through her day to day routine, "certainly this would not involve any form of paid work".

27. Mr Breakwell said:

- Surgical intervention at this stage would make no difference to Mrs L's pain.
- A holistic approach from a pain clinic, including CBT, was vital.
- He had encouraged Mrs L to increase her exercise tolerance and mobility to improve her quality of life.
- Currently Mrs L was unable to work in any guise.
- He was hopeful that with regular exercise and the right pain management approach Mrs L should be able to improve her exercise tolerance and her quality of life somewhat but he had made it quite clear to her that there was no cure for her back pain.

28. Dr Senior wrote to the Council on 27 September 2013. She said:

- There was no indication from the reports of any psychological treatment.
- There was no new information or new clinical information that would support early retirement on grounds of ill health.

29. On 10 October 2013, Dr Davies (IRMP) gave her opinion that Mrs L was not permanently incapable of efficiently discharging her duties of employment:

> "There is no dispute that Mrs [L] has pain it is how she is managing the pain and the disability that she is demonstrating, which is impacting on her ability to work. There was no evidence provided initially, at appeal or on further request with regards to her having accessed the psychological treatments which are available. Mrs [L] has 20 years until she reaches the age of 65 years. There is time for referral, treatment and assessment of the response.
>
> After consideration of all the evidence available to the two IRMP's [sic], the new evidence provided and the request for clarification regarding treatments received, in my opinion she does not fulfil the criteria of being permanently incapable and therefore does not fulfil the criteria of the LGPS for ill health."

30. The Council's stage 1 referee turned down Mrs L's appeal:

> "…taking into account this latest opinion and all other relevant evidence, my decision has to be that you do not fulfil the criteria necessary for ill health retirement benefits."

31. At IDR stage 2 Mrs L submitted a 'To Whom it May Concern' letter from Ms Lappin (Advance Physiotherapist) dated 3 April 2014. Ms Lappin said she had first seen Mrs L in June 2013. Apart from commenting on Mrs L's current condition she summarised the history of Mrs L's back pain and commented on Dr D's opinion. She said:

> "I note in a recent report, the settlement has been refused again "with regards to her having access to psychological treatments which are available". All the treatments that [Mrs L] has had through her difficult few years have been with a psychological cognitive behavioural approach…I am at a loss to understand why this is not seen as such. Because of this input in my opinion there is no further known medical or psychological treatment that would enable [Mrs L] to resume her previous full time working capacity in the foreseeable future."

32. SYPA turned down Mrs L's appeal at IDR stage 2 on the grounds that as there was no fault with the application of the regulatory requirements, or the process that had been followed, there were no grounds to remit Mrs L's case back to the stage 1 referee for reconsideration.

33. Mrs L is represented by MKB.

Adjudicator's Opinion

34. Mrs L's complaint was considered by one of our Adjudicators who concluded that further action was required by the Council. The Adjudicator's findings are summarised briefly below:

- The Council failed to clarify Dr Williams' opinion and their letter notifying Mrs L that they could not award her ill health retirement, because they had to be guided by the judgment of the IRMP, did not amount to a reasoned decision.

- Dr Oliver's opinion that therapies to modify Mrs L's pain might be helpful did not go far enough - he failed to name the therapies, say why he considered they would help Mrs L and to what extent. The Council did not ask him.
- The Council failed to see the full reports of Dr Williams and Dr Oliver.
- Dr Davies did not identify the psychological treatments she had in mind or explain why she considered it likely that these would enable Mrs L to discharge efficiently her former duties and the Council did not ask her.
- Dr Davies did not appear to have considered Mr Bosman's report of 11 April 2013.
- At IDR stage 1 the Council failed to give a reasoned decision for turning down Mrs L's appeal.
- These shortfalls were not rectified at IDR stage 2.

35. The Council and SYPA accepted the Adjudicator's Opinion.

36. While MKB have advised that Mrs L is "extremely pleased" with the outcome of the Adjudicator's Opinion, they have raised a number of matters which they believe should be considered and consequently the complaint was passed to me to consider.

37. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by MKB for completeness.

Ombudsman's decision

38. MKB say the medical expenses plus legal fees that Mrs L has incurred could have been avoided had the Council and SYPA complied with the Regulations and the award for distress and inconvenience should be increased to reflect this.

39. But it was Mrs L's choice to obtain the medical reports. The reports were not requested by the Council/their medical advisers. Consequently the Council are not liable to reimburse these to Mrs L.

40. Similarly it was Mrs L's choice to employ MKB to help bring her complaint to this office and represent her.

41. In all the circumstances I consider £500 to be reasonable for the significant distress and inconvenience that Mrs L has been caused.

42. Therefore, I uphold Mrs L's complaint.

Directions

43. To put matters right:

- Within 14 days of the date of the Determination the Council will pay Mrs L £500 for the significant distress and inconvenience caused and request a medical report and certification from another IRMP not previously involved as to whether Mrs L satisfied the criteria for tiered benefits from the date her employment ended.

- Within 21 days of receiving the IRMP's opinion the Council should make a wholly fresh decision and inform Mrs L of their decision, together with their reasons.

Anthony Arter

Pensions Ombudsman
19 July 2016

Appendix

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007

44. Regulation 20 deals with ill-health retirements from active service. As relevant it says:

> "(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5-
>
> (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 in accordance with this regulation in the circumstances set out in paragraph (2) [Tier 1], (3) [Tier 2] or (4) [Tier 3], as the case may be.
>
> (2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased-
>
> (a) as if the date on which he leaves his employment were his normal retirement age; and
>
> (b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.
>
> (3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age, his benefits are increased-
>
> (a) as if the date on which he leaves his employment were his normal retirement age; and
>
> (b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.
>
> (4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or normal retirement age if earlier, his benefits-

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(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.”