CAS-29383-G2W0

Ombudsman's Determination

Applicant	Mrs S
Scheme	NHS Pension Scheme (**the Scheme**)
Respondent	NHS Business Service Authority (**NHS BSA**)

Outcome

1. I do not uphold Mrs S' complaint and no further action is required by NHS BSA.

Complaint summary

2. Mrs S' complaint against NHS BSA concerns its decision to award her Tier 1 ill health retirement pension (**IHRP**) benefits. She believes she should have been awarded Tier 2 benefits and would like this to be retrospectively backdated to the date she left her NHS employment.

Background information, including submissions from the parties

3. Regulation 90 of the NHS Pension Scheme Regulations 2015 (SI 2015/94) (**the 2015 Regulations**), applies to Mrs S' application for an IHRP; relevant sections of which are set out in Appendix 1.

4. From 2005, Mrs S worked for the NHS as a staff nurse. In 2007, she took up additional responsibilities as a Cognitive Behavioural Therapy practitioner and a therapist. From 2012, she worked as a community psychiatric nurse.

5. From June 2013 to March 2014, Mrs S was on sickness absence. She was subsequently redeployed to a Community Mental Health Team. In November 2014, she was offered a non-clinical office job with little interaction with others.

6. From 16 February 2015, Mrs S went on sickness absence due to work related stress.

7. In around April 2015, Mrs S started a personal injury claim (**PIC**) against Northumberland Tyne & Wear NHS Foundation Trust (**the Employer**). This was on the grounds that she had suffered a psychiatric injury consequent upon her employment.

8. On 9 October 2015, Mrs S applied for an IHRP due to Post Traumatic Stress Disorder (**PTSD**) that she had suffered from 2012. She was age 39 when she applied. Her normal pension age (**NPA**) is 67.

9. In her submissions, Mrs S provided a medical report from Consultant Psychiatrist, Dr Elanjithara. Relevant sections of this report are set out in Appendix 2.

10. On 28 October 2015, NHS BSA sent Mrs S a decision letter declining her application. NHS BSA said that Mrs S did "not have sufficient evidence at this case [sic] to be clear as to the underlying diagnosis or prognosis". It referred to the opinion of the Scheme Medical Advisor (**SMA**), who had concluded that Mrs S "has 28 years outstanding to normal pension age, which gives ample time for full recovery such that the duties of the current post are medically within her capacity."

11. On 28 April 2016, Mrs S' RCN representative, Mr G, appealed against NHS BSA's decision under the Scheme's two-stage Internal Dispute Resolution Procedure (**IDRP**). In his submissions at IDRP stage one, Mr G provided a medical report from Consultant Psychiatrist, Dr Vincenti dated 28 October 2015. Relevant sections of the report are set out in Appendix 3.

12. On 18 May 2016, NHS BSA sent Mrs S a response under stage one of the IDRP, upholding her appeal and awarding her Tier 1 benefits. It referred to its SMA who made the following points:-

    - The evidence showed that Mrs S had been diagnosed as suffering from PTSD with perceived work stressors being contributory factors.

    - Although there was uncertainty on the longer prognosis, Mrs S was not likely to be able to return to the NHS employment given the background to the stress related illness.

    - Dr Vincenti said that: "the duration of the above conditions makes a compete cure less likely however…treatments likely to be of benefit…response to treatment will improve when litigation is finalised…she will benefit from working in suitable alternative work when she has improved sufficiently."

    - While the above level of incapacity could be accepted, it was reasonable that, with closure to stressful matters, there could be sufficient response to treatment to enable Mrs S to take up alternative employment.

    - Relevant medical evidence indicated that reassessment against the Tier 2 condition within three years of the date of the notification of the Tier 1 benefits, or before Mrs S' NPA, whichever was sooner, should not be allowed. The evidence did not indicate the "likelihood of significant deterioration in functional capacity in the above period given what can be achieved by treatment and easing of stress in an occupational context."

13. In June 2016, the Employer held a sickness absence meeting with Mrs S. It confirmed Mrs S' last day of employment would be 23 June 2016.

14. In March 2017, Mr G emailed Mrs S regarding a further appeal under IDRP stage two. He informed her that he had received advice from the RCN's legal officer that did not recommend pursuing an appeal at this stage. He further referred to the legal officer who said:

> "Please convey to her how sorry I am to have to say there is nothing further to be done at present with regard to her [IHRP] benefits. It is not unusual for medical examiners to put a 3 year time block on reassessment for tier 2. In part, this is likely because of the fact that Dr Vincenti refers to litigation being a 'block' on improvement. The 3 year period allows for litigation to be completed, along with any treatment options following which your member ***may*** be able to return to some form of work. As your member's normal retirement age is 67, there is a period of 27 years until that is realised and in that 27 year period it has to be considered that there is scope for improvements for your member." (Original emphasis)

15. Around April 2018, Mrs S' PIC was settled out of Court. It was acknowledged by the Court that Mrs S had been left permanently injured as a result of her NHS employment and the Employer accepted liability for this.

16. In October 2018, Mrs S' new RCN representative, Mr Y, contacted NHS BSA to request an appeal under stage two of the IDRP.

17. On 30 October 2018, NHS BSA sent a letter to Mr Y saying that Mrs S' appeal was out of time because it had been submitted more than six months after the IDRP stage one decision. NHS BSA also said that, as its SMA recommended that it was not appropriate to offer Mrs S reassessment against the Tier 2 award within a period of three years from the date of the Tier 1 award, there were no other provisions within the 2015 Regulations to review Mrs S' entitlement to Tier 2 benefits.

18. Mrs S' position is:-

- At the time of the appeal process, she was too unwell to pursue the IDRP stage two appeal and had no support professionally to do it.
- The PIC award was insufficient, as she will never be able to return to any type of work.
- She has been left with severe PTSD, which impacts her daily life.
- She has been trying to claim State benefits as she has struggled financially. She has felt ashamed of this situation.
- As the Court found that she was permanently injured, NHS BSA should make the same finding and award her Tier 2 benefits.

19. NHS BSA's position is:-

- Regulation 90 of the 2015 Regulations requires a member to be: "permanently incapable of both doing their NHS job AND permanently incapable of regular employment of like duration to their NHS job irrespective of whether such employment is actually available to them."
- It took advice from a panel of professionally qualified and experienced SMAs who have access to specialist advice where necessary and carry out a forensic analysis of the available medical evidence.
- It has properly considered Mrs S' application, taking into account and weighing all relevant evidence and nothing irrelevant. It has taken advice from its SMAs, considered and accepted that advice and, as a result, arrived at a decision that it believes is not perverse.

Adjudicator's Opinion

20. Mrs S' complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised below:-

- Members' entitlements to benefits when taking early retirement due to ill-health are determined by the scheme rules or regulations. The scheme rules or regulations determine the circumstances in which members are eligible for ill-health benefits, the conditions they must satisfy and the way in which decisions about ill-health benefits must be taken.
- In Mrs S' case, the relevant regulation is Regulation 90 of the 2015 Regulations.
- Under Regulation 90, to be eligible for a Tier 2 IHRP Mrs S must be "permanently incapable of regular employment of like duration…in addition to meeting the Tier 1 condition" until age 67.
- The first instance decision was made by the SMA under a delegated authority from NHS BSA. NHS BSA acted on behalf of the Secretary of State. The decision was made by the correct decision-maker so the decision could not be challenged on that basis.
- The decision-maker was required to consider all relevant evidence available to them and ignore all irrelevant information. However, the weight which was attached to any of the evidence was for NHS BSA to decide, including giving some of it little or no weight. It was open to it to prefer the advice of its own medical advisers unless there was a cogent reason why it should not, or, should not without seeking clarification. Such as errors or omissions of fact on the part of the SMA, or a misunderstanding of the relevant regulations.

- NHS BSA's decision was made on the balance of probabilities. The first instance decision declined Mrs S' application for an IHRP. Upon submission of further evidence at IDRP stage one, NHS BSA took account of Mrs S' additional medical evidence and awarded her Tier 1 benefits.

- NHS BSA appropriately considered the question of whether Mrs S would likely be "permanently incapable of regular employment of like duration…in addition to meeting the Tier 1 condition" until age 67.

- NHS BSA was required to consider the likely prognosis of Mrs S' condition at the date of application. That required a forward-looking assessment on the balance of probabilities based on the evidence then available. NHS BSA was also required to consider any additional evidence which might be submitted during the IDRP that related to the condition as at the date of application. This had occurred.

- NHS BSA sought more than one SMA's report after Mrs S submitted further evidence from her doctors in support of her application. The SMAs assessed Mrs S' diagnosis of PTSD and her likelihood of returning to an employment of like duration.

- At the time of the original application, Mrs S did not provide sufficient evidence to support the diagnosis of PTSD. However, further evidence from Consultant Psychiatrist, Dr Vincenti, dated October 2015, supported the diagnosis. The SMA gave his/her opinion that having 28 years left until Mrs S' retirement age, with the right treatment, there was scope for improvement in her PTSD. The SMA's opinion was compatible with the evidence from Mrs S' doctors.

- Turning to Mrs S' PIC award. Mrs S argued, as the Court found that she was permanently injured, NHS BSA should have made the same finding and awarded her Tier 2 benefits.

- NHS BSA accepted that work stressors contributed to Mrs S' PTSD. However, NHS BSA was expected to assess her application in accordance with the criteria set out in Regulation 90, which was different to the criteria used by the Court. Permanent injury was not the same as permanent incapacity for alternative work of like duration. An individual could have a permanent medical condition which did not permanently prevent them from working.

- Mrs S said she was too unwell to meet the deadline for the IDRP stage two appeal. However, insufficient evidence had been submitted to support her claim. Mrs S was receiving assistance from Mr G and Mr Y at different stages of her complaint which could have provided the necessary support for her to appeal earlier.

- While Mrs S did not consider NHS BSA's decision to be satisfactory, its decision appeared to have been properly made. Consequently, there are no grounds for the Ombudsman to remit the matter back to NHS BSA.

21. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. I note the further comments that Mrs S' husband has provided on behalf of his wife, however, I agree with the Adjudicator's Opinion.

22. Mr S says:-

- NHS BSA's decisions are based on how long his wife has left until her NPA. He finds this "fallacious".
- All decisions are based on the balance of probability, but clearly NHS BSA do not understand how probability works. There are two probabilities, his wife will get better or she will not. Everything that has happened indicates the latter. His wife has undertaken all possible treatments and is now "well past the three-year period required for reassessment", but still she is not in a position to seek employment. The longer this continues the more probable it is that she will never be able to return to employment.
- The whole appeals process is confusing and discriminatory. This was deliberate to try to avoid ever awarding Tier 2 to someone with his wife's diagnosis.
- If his wife had to wait three years before any appeal could be considered, then the appeal period should have been extended to six months after the three-year period had expired.
- His wife tried to persuade the RCN to lodge an IDRP stage two appeal, but it refused. If she had been well enough, she would have lodged the appeal herself.
- The Tier 1 award should be reviewed as the current evidence is that she has not recovered sufficiently to look for work.
- The Adjudicator has made continued reference to his wife's PIC against the Employer. But the PIC has no bearing on her pension award and should be removed from the findings.
- The Adjudicator has missed the crux of the complaint. The evidence shows that PTSD is not a temporary illness but "a crippling, acute and pernicious illness that is life altering and affects [his wife] every day".
- While Dr Vincenti said his wife may benefit from suitable alternative work when she has improved sufficiently, in a joint report, dated 27 September 2017, Dr Vincenti and Dr Mumford say the only work she would be capable of is: non-stressful, with predictable duties, no sudden surges of demand or pressure, involving no shift work or confrontational situations with members of the public. Exactly what job could she do that does not fall into one of these categories? But even if she could find such a job, it will not be the job she loved and will be nowhere near the pay she was receiving as a top Band 6 nurse.

- The insistence that his wife could return to work at some vague point in the future has been damaging to her mental health and should have been considered in the award of ill health benefits.

- The Court acknowledged that his wife had been left permanently injured as a result of her NHS employment and the Employer accepted liability for this. Clearly, this was not considered in the ill health award. If his wife has a permanent illness the chances of her recovering to a point where she could return to employment in any capacity is severely reduced. Again, this merits a Tier 2 award.

- How is NHS BSA able to refer to advice from SMAs who did not see his wife? He finds it highly suspect that NHS BSA has not mentioned that his wife was medically assessed by a doctor from her occupational health department who decided that she should be given ill health retirement.

23. Mr S has submitted with his comments a joint report, dated 26 September 2017, from Consultant Psychiatrists, Drs Vincenti and Mumford, on Mrs S' illness and likely capability for work before her NPA.

Ombudsman's decision

24. I have put to one side the submitted joint report from Drs Vincenti and Mumford, as it was not available at the time NHS BSA made its decision to award Mrs S Tier 1 benefits.

25. In this matter, it is not for me to review the medical evidence and decide whether Mrs S is entitled to Tier 1 or Tier 2 benefits. I am primarily concerned with the decision-making process. It is not relevant whether I agree or disagree with the actual decision that was made.

26. Mr S is adamant that his wife should be awarded Tier 2 benefits.

27. Mr S suggests that there are two possible outcomes. His wife will get better or she will not. In fact, the 2015 Regulations recognise a spectrum of recovery and requires a member to be somewhere on that spectrum where they are not able to undertake regular employment of like duration to their NHS employment.

28. NHS BSA was required to assess Mrs S' eligibility for an IHRP in line with the criteria set out in the 2015 Regulations; and to do so in consultation with its SMA.

29. Mr S suggests that the SMAs should have carried-out a face to face assessment of his wife, rather than a paper based one. But there is no requirement under the 2015 Regulations for the SMA to do so.

30. After considering the medical evidence, the SMA, at IDRP stage one, was of the opinion that it was likely, with the closure of stressful matters, such as litigation, and in response to appropriate treatment for her PTSD and depression, Mrs S would be

capable of undertaking suitable alternative employment before her NPA. This opinion appears to be compatible with the opinions of Drs Elanjithara and Vincenti.

31. There seems to be some confusion on Mr S' part regarding IDRP and the three-year review. These are separate matters. IDRP is the procedure which allows anyone who has dealings with the Scheme, such as actual and potential beneficiaries, to raise a complaint with NHS BSA about matters relating to the Scheme. The three-year review is granted by the NHS BSA if it considers, on the advice received from the SMA, that a review for a Tier 2 award is merited within three years of the decision to award Tier 1. In Mrs S' case, the SMA at IDRP stage one did not recommend a review, as the evidence did not indicate the likelihood of a significant deterioration in her functional capacity in the three-year period.

32. Mr S says the Tier 1 award should be reviewed as the current evidence is that his wife has not recovered sufficiently to look for work. But that is applying the benefit of hindsight. While it appears that Mrs S is not currently able to work, that does not mean that NHS BSA's decision was flawed at the time of the assessment.

33. Mr S has asked that all reference to his wife's PIC be taken out. But I have left some reference to it, as Mr S argues that NHS BSA should have accepted the Court's decision on permanent injury. As explained by the Adjudicator, the criteria set out in the 2015 Regulations would have been different to the criteria used by the Court. Permanent injury is not the same as permanent incapacity for alternative work of like duration.

34. Mr S says his wife tried to persuade the RCN to submit an appeal at IDRP stage two. I have put these comments to one side as this issue is outside of my jurisdiction. If Mrs S is unhappy with the advice she received from the RCN she may choose to raise this issue directly with it.

35. I am satisfied that the relevant 2015 Regulations have been correctly applied and appropriate medical evidence was considered. I find no grounds for saying that NHS BSA erred in its decision.

36. I do not uphold Mrs S' complaint.

Anthony Arter

Pensions Ombudsman
18 August 2020

Appendix 1

Regulation 90 of the NHS Pension Scheme Regulations 2015

"(1) An active member (M) is entitled to immediate payment of—

(a) an ill-health pension at Tier 1 (a Tier 1 IHP) if the Tier 1 conditions are satisfied in relation to M;

(b) an ill-health pension at Tier 2 (a Tier 2 IHP) if the Tier 2 conditions are satisfied in relation to M.

(2) The Tier 1 conditions are that—

(a) M has not attained normal pension age;

(b) M has ceased to be employed in NHS employment;

(c) the scheme manager is satisfied that M suffers from a physical or mental infirmity as a result of which M is permanently incapable of efficiently discharging the duties of M's employment;

(d) M's employment is terminated because of the physical or mental infirmity; and

(e) M has claims payment of the pension.

(3) The Tier 2 conditions are that—

(a) the Tier 1 conditions are satisfied in relation to M; and

(b) the scheme manager is also satisfied that M suffers from a physical or mental infirmity as a result of which M is permanently incapable of engaging in regular employment of like duration."

Appendix 2

37. In his report dated 3 July 2015, Consultant Psychiatrist, Dr Elanjithara said:

> "Mrs S suffers from [PTSD]. This mental disorder seems to have manifested as a protracted response to a series of stressful events which dates back to her time in the clinical team supporting the veterans. She described a series of stressful situations in this job, the latter of which was to deal with a colleague who was suicidal. Mrs S reportedly suffers with intrusive memories or flashbacks of her difficult time in this role. She also reports having nightmares and described herself as 'emotionally numb and detached'. She described several scenarios which indicated a high level of arousal and perception of threat. She displayed high levels of anxiety and low mood which seems to have been exacerbated over the past few months. These features, although present to a form of depression or anxiety disorder [sic]. There is also a level of avoidance of situations that either directly or indirectly link to these stressful work situations. These include not been [sic] able to drive past the roads that led to patients' homes when she was working in this job.
>
> It appears that the events in her early childhood might have sensitised her to such a mental disorder, but there is a significant period of stable work and relationship history before the onset of the psychological trauma (PTSD) which seems to coincide with the reported series of work related stressful events.
>
> **Treatment to date**:
>
> Mrs S has had about 60 sessions of psychotherapy with Julie Stewart, a Psychotherapist working for Team Prevent. The report forwarded to me by Julie Stewart suggests that Mrs S suffered a range of anxiety and trauma related symptoms in recent months. There were significant challenges to focus on in the therapy, as her high levels of anxiety interrupted her ability to engage in therapy. They have attempted a number of stabilisation techniques to facilitate working through EMDR (Eye Movement Desensitization and Reprocessing; a recognised method of treatment for PTSD) but Mrs S' reactions to here and now issues such as management, union, legal process and family health issues all seem to have affected her ability to be attentive and engaged in the therapy.
>
> …
>
> **Future management plan**:
>
> I have discussed with Mrs S that she will need a focused treatment including a combination of pharmacological and psychological treatment to deal with her current difficulties. Mrs S would require further stabilisation of her anxiety, arousal, possible dissociation, fear and avoidance behaviour before she can engage in trauma focused therapy such as EMDR. For the stabilisation process, she would require a balanced use of pharmacological options; an SSRI such as Sertraline in the first instance. Also there should be limited use of medications such as diazepam that can interfere with trauma focused

therapy. But limiting diazepam should go in parallel with offering alternative medications that interfere less with therapy or other psychological techniques.

At the Psychological Trauma Team at the Tuke Centre, we successfully use a comprehensive approach to psychological techniques that are based on Dialectical Behavioural Therapy (DBT). Mrs S may require a few weeks of stabilisation work with a clinician before EMDR can be used. Her future psychological treatment must be carefully orchestrated with pharmacological therapy.

Prognosis:

Mrs S is clearly stating that her return to the Trust in any capacity would undermine her mental stability and would make her more suicidal. It appears that she has lost all trust and hope in her current situation and that any move to return to work is highly likely to exacerbate her mental disorder. As the ongoing legal and management issues have clearly interfered with her ability to engage in therapy and thereby impinged her progress, it is necessary that a resolution is found in these matters at the earliest opportunity. It would be possible to ascertain her progress and prognosis, once the above matters are conclusively settled."

Appendix 3

In his report dated 28 October 2015, Consultant Psychiatrist Dr Vincenti said:

> "In my opinion, Mrs S would meet the diagnostic criteria for PTSD. I agree therefore with the primary diagnosis of Dr Elanjithara of PTSD… Given the persistence of Mrs S' PTSD symptoms in spite of a lot of treatment, and their disabling nature, I would rate her PTSD at the severe end of the clinical spectrum.
>
> …
>
> I would allocate a second diagnosis to Mrs S of moderate depression as defined by ICD10, and coded F32.1.
>
> **Prognosis**
>
> Turning to avoidance symptoms the most striking example in this case is Mrs S' inability to cope again with a clinical work setting.
>
> …
>
> As Mrs S has been unwell for 2 years or more, the prognosis for her PTSD and depression is now less promising than would normally be the case for most patients suffering these diagnoses separately. Whenever patients suffer from two or more co-morbid diagnoses, the prognosis does fall off appreciably.
>
> Mrs S may be in a position to attempt some voluntary work and that it would by necessity have to be in a non-pressurised environment, where her duties are well defined and predictable, and which do not include sudden surges of demand or pressure.
>
> On the balance of probabilities, I think it unlikely that Mrs S will now be able to cope again with working as a mental health nurse. She is currently unfit for any work at all.
>
> Her mental health problems are likely to place her at some disadvantage in future employment. In my view she is unlikely to cope with work of a particularly demanding or stressful nature.
>
> …
>
> the duration of the above conditions makes a complete cure less likely however…treatments likely to be of benefit…response to treatment will improve when litigation is finalised…she will benefit from working in suitable alternative work when she has improved sufficiently."