CAS-38071-Y2W4

Ombudsman's Determination

Applicant	Mr E
Scheme	NHS Pension Scheme (**the Scheme**)
Respondent	NHS Business Services Authority (**NHS BSA**)

Outcome

1. I do not uphold Mr E's complaint and no further action is required by NHS BSA.

Complaint summary

2. Mr E's complaint is that NHS BSA has not properly considered his claim for early payment of his pension on grounds of ill-health.

Background information, including submissions from the parties

3. This complaint originates in a prior complaint (PO-22843), determined in July 2019. Neither side disputed the background; the dispute was over their interpretations of the relevant medical opinions. The Determination said:

> "Mr E's application for a pension had been submitted to OH Assist on the basis that this was an application for payment of his deferred pension… However, at the first stage of Mr E's appeal, NHS Pensions identified the fact that he could make a retrospective claim for ill-health retirement from active service. There is no obvious reason why this could not have been picked up by OH Assist from the initial application. I find, however, that this oversight was addressed on appeal, inasmuch as both appeal reviews assessed Mr E by reference to the requirements of regulation 90." [Paragraph 35]
>
> "Apart from the exception referred to in paragraph 35, I consider the decision-making process in Mr E's case to have been carried out in a proper manner. However, the consequence of his case having started off as a request for payment of his deferred pension is that Mr E has only had an opportunity to appeal the regulation 90 decision on one occasion; he would normally have had two chances to appeal. I find that Mr E should have been offered a further appeal option. I note that [NHS BSA] accepts this and I need not make any further directions concerning this aspect of Mr E's complaint." [Paragraph 36]

4. On 8 July 2019, NHS BSA asked Mr E to provide any further submissions. However, on 10 July 2019, he said he had nothing to add.

5. The governing regulations are the National Health Service Pension Scheme Regulations 2015 (SI2015/94) (as amended) (**the Regulations**). Relevant extracts from the Regulations are provided in the Appendix.

6. In August 2019, NHS BSA referred Mr E's case to an independent registered medical practitioner (**IRMP**) with no prior involvement in the case. In his report, the IRMP said:

> "I understand changes in [Mr E's] health after he left employment are not relevant to the determination of whether [he] satisfied the pension scheme definitions as of his last day of service. I have therefore not taken the subsequent course of [Mr E's] illness into account…
>
> The case has been considered on an individual basis and decisions are made on the balance of probabilities…
>
> In the AW240 (PC) form completed by Mr Harris [**the Consultant**], dated 12 October 2015 under the prognosis section it is stated "good prognosis with balance therapy…
>
> In a report dated 29 September 2017 from [the Consultant], it is noted that [Mr E] has had all the medical and therapeutic input for his symptoms and that the transtympanic injections had not been effective. [The Consultant] stated that "the remaining options for management are transtympanic injection of gentamicin", although notes that this may make some of the symptoms worse. The other management option [is] to undertake an endolymphatic duct blockage surgical procedure, which is described as an invasive procedure which would not have any positive effect on hearing, tinnitus or the overall balance and would be aimed at stopping the vertigo attacks and it is quoted that there would be a 90% chance of stopping these attacks. [The Consultant] states it would be entirely reasonable for [Mr E] to decline this surgery at least in part due to the potential for there being undue side effects...
>
> [The Consultant] also provided a response to a request for further medical evidence, dated 9 April 2018. In answer to the question: is my understanding of your opinion as to [Mr E's] prognosis in 2015 correct (i.e. that the prognosis related to the date in October 2015)? [the Consultant] has responded, yes.
>
> The key consideration is whether, at the time he left employment, the incapacity arising from [Mr E's] Meniere's disease was likely to have been permanent. When considering if a medical condition would be likely to give rise to permanent incapacity I would first consider whether, in the absence of future treatment, the incapacity would be likely to be permanent and, if so, to… consider whether future treatment would be likely to alter this.

> The medical evidence provided by [the Consultant] indicates that the expected prognosis at the time was good and [the Consultant] stated that "50% resolve within two years and 70% resolve spontaneously after eight years". This would indicate a clear expectation, at that time, that the condition would more likely than not resolve before [Mr E's] normal pension age. The medical evidence therefore indicates that, at the time of leaving employment, even in the absence of future treatment, [Mr E's] incapacity was unlikely to have been permanent...
>
> It is my opinion that relevant medical evidence has been considered in this case and, on the balance of probabilities, indicate that at the time of leaving employment on the 21 October 2015:
>
> > The applicant was not permanently incapable of the NHS employment; the tier 1 condition was [therefore] not met and;
> >
> > The applicant was not permanently incapable of regular employment of like duration; the tier 2 condition was [therefore] not met.
>
> I appreciate and acknowledge that [Mr E's] symptoms have not improved as [the Consultant] anticipated and that there has been no response to subsequent treatment and I also acknowledge that [the Consultant's] opinion has changed with the passage of time and now indicates permanent disability.
>
> However, the outcome of this application does not depend upon whether [Mr E's] incapacity is now considered likely permanent; rather, it depends upon whether his incapacity was considered likely to have been permanent at the time he left employment. The evidence indicates that it was not.
>
> Whilst I have every sympathy with [Mr E's] difficulties, the pension scheme criteria are clear and it is the medical evidence referring to the time that he left employment which is to be taken into account."

7. On 22 August 2019, NHS BSA responded to Mr E's appeal under stage two of the Scheme's internal dispute resolution procedure (**IDRP**). It said:

> "The [IRMP] who has reviewed your application has explained that the information provided by [the Consultant] provides a clear expectation that, as at October 2015, even in the absence of future treatment [Mr E's] medical condition was likely to have resolved before normal pension age which would allow [him] to return to [his] NHS employment. As such, on the balance of probabilities as at 21 October 2015 it is considered that [Mr E was] not permanently incapable of discharging the duties of [his] NHS employment…
>
> … the correct question to be addressed is whether [Mr E's] incapacity for efficiently discharging the duties of [his] NHS employment was permanent. This is not the same as asking whether the condition was permanent…

> … I trust you will also understand that it is not a compulsory requirement for [the IRMP] to obtain further medical evidence when considering an application for ill-health retirement benefits. [The IRMP] will only seek further evidence if they deem it necessary to assist their clinical consideration. In your case, further clarification had previously been obtained from your treating Specialist and it is this evidence which [the IRMP] has given the greatest weight in reaching his recommendation…
>
> … In this instance therefore, having carefully considered the comments of the [IRMP] I can see no reason to disagree with his conclusion. Nor do I consider that the conclusion is perverse; that is, one which no reasonable body of people could have reached based on the same evidence. As such my decision is that [Mr E is] not entitled to ill health retirement benefits."

NHS BSA's position

8. The key points of NHS BSA's position are outlined in its stage two IDRP response, as quoted at paragraph 7 above.

Mr E's position

9. The key points of Mr E's position can be summarised as follows:-

- NHS BSA has departed from the Regulations and misinterpreted the Pensions Act 1995. Reference to his prognosis "being good with balance therapy had been [sic] ascribed an imbalanced and disproportionate importance of greater value than the confirmation of permanency (as required by the Act) without proper explanation".
- NHS BSA has not asked the Consultant his opinion on permanency at the time of leaving employment. So, it has wrongly inferred his incapacity was not permanent.
- The IRMP has failed to obtain a full description of his condition from the Consultant.
- He was informed, at stage one IDRP, that treatments had not been explored. But, he has received all the necessary treatments, and they have been ineffective.
- NHS BSA says the Consultant confirmed that he (Mr E) was not permanently incapable of doing his NHS job at the time of leaving employment. But, he saw no evidence of this from the Consultant.
- He has asked NHS BSA to clarify this point with the Consultant; it says the IRMP is not obliged to obtain further evidence, but has not explained why.
- The IRMP gave greatest weight to the Consultant's evidence but has not said what exactly was given priority, aside from the Consultant's comment regarding his prognosis being good.
- He was suffering from a "permanent" medical condition, as confirmed by a specialist; he has also been signed off indefinitely by that specialist.

Adjudicator's Opinion

10. Mr E's complaint was considered by one of our Adjudicators, who concluded that no further action was required by NHS BSA. His findings are summarised below:-

- It was not for us, ie The Pensions Ombudsman, to review the medical evidence and decide if the Applicant should be awarded an ill-health pension; our role was to assess if a proper decision-making process was followed. We would consider if the decision-maker obtained appropriate evidence; if the relevant regulations had been applied correctly; and, if the decision was supported by appropriate medical evidence. We would only remit the matter back to the decision-maker if there was evidence of procedural unfairness or a material error.

- The Consultant's comments of February 2018, which he confirmed related to the time of leaving employment in October 2015, set out his view that 50% of people recover spontaneously within two years and 70% within eight years. The IRMP said that that showed a clear expectation that, as at the time of leaving employment in October 2015, Mr E's condition was more likely than not to resolve before age 67.

- Had the IRMP thought the Consultant's view on this point was unclear, the former could have requested further clarification. However, he did not think that that was necessary. In this regard, the correct process had been followed, that is, it was for the IRMP, not the Consultant, to recommend whether the criteria had been met.

- As previously mentioned by the IRMP and NHS BSA itself, the relevant question was not whether Mr E's condition could generally be described as being permanent; the question was whether Mr E's incapacity, to do his previous job or a similar qualifying job, was considered likely to be permanent at the time of leaving employment (with "permanent" meaning until age 67). The Regulations provide that NHS BSA should make that assessment: on the balance of probabilities; based on appropriate medical evidence; and, based on advice from a Scheme-appointed IRMP (and any treating specialists).

- The Consultant's evidence was about the likelihood that the condition would resolve spontaneously. The issue of whether Mr E wished to undergo certain treatments was not relevant to the IRMP's assessment.

- In summary, the IRMP's view was that the Consultant's evidence indicated a clear expectation that, at the time of leaving employment, Mr E's condition was more likely than not to resolve before age 67, with "resolve" meaning he would be able to do his former job or a similar qualifying one. In line with the Regulations, the IRMP was entitled to rely on the Consultant's view in this regard.

- The Ombudsman's Determination identified that Mr E had had only one chance to appeal NHS BSA's decision whether to grant Mr E benefits from active service. Therefore, the appropriate remedy was for NHS BSA to give him another chance to appeal. This had now happened.

- There was no error in NHS BSA's accepting the IRMP's opinion; it agreed with the opinion, but only after considering it. That is what the Ombudsman would expect.

11. NHS BSA accepted the Adjudicator's Opinion and provided no further comments. Mr E did not accept the Opinion and made the following key points:-

- He quoted the IRMP's comment that "I appreciate and acknowledge that [Mr E's] symptoms have not improved as [the Consultant] anticipated, and that there has been no response to subsequent treatment and I also acknowledge that [the Consultant's] opinion has changed with the passage of time and now indicates permanent disability". But, he did not think the Consultant's view had changed.

- In addition, the Consultant's (current) view that Mr E had a "permanent disability" ought to carry some weight in NHS BSA's assessment.

- All the emphasis has been on the time of his leaving employment. However, at the time, not all the medical evidence was available as the right questions were not asked to formulate a definitive opinion. And, although reference has been made to there being no response to subsequent treatments, nor was there any response to treatments at or before the time of leaving employment.

- He disagrees with the Adjudicator's Opinion in part as he believes that NHS BSA has reached an adverse decision that is too restrictive. It has failed to determine "the election date of permanence in reference to the Regulation". This decision to deny his claim has caused him a substantial loss of earnings, placed him at an unfair disadvantage and breached his human rights.

- He appeals under "the protection of the Regulation and the Pension Act where reference is made to payment of early ill health pension from the appropriate date, which can be any date on which the member becomes permanently incapable". He also understands that benefits are payable from any date when the former member applies for the early payment of benefits; or, from the date permanent incapacity is judged to have arisen, whichever is the later.

- He requests that consideration be given to early payment of his pension on grounds of ill-health, to start from the onset of permanence, which could be at or after the time of leaving employment in October 2015.

- He requests that the Consultant and the IRMP agree on the commencement date of permanence for his condition which, according to the medical evidence, started in February 2010 and was diagnosed in April 2015. 91(2)(e) of the Regulations provides that "any other matter the scheme manager thinks appropriate" be considered. If this request is deemed to be irrelevant, then he requests a full explanation of the procedures in writing.

- He requests that his case be re-considered; that further enquires be made; and, that a revised Opinion be issued. In his view, consideration should be given to the

> "true onset date of permanence"; and, the "election date of permanence" should be the same as the start date of the early ill-health pension.

12. The complaint has now been passed to me to consider. I agree with the Adjudicator's Opinion and will therefore only respond to the key points made by Mr E for completeness.

Ombudsman's decision

13. As mentioned in the previous Determination, it is not my role to review the medical evidence and reach my own decision about whether Mr E should be awarded an ill-health retirement pension. It is my role to review the way that decision was reached, that is, whether the decision-maker has obtained appropriate evidence on which to base a decision; whether the relevant regulations have been applied correctly; and, whether the decision is supported by the available evidence.

14. In Mr E's case, I find that appropriate steps were taken to obtain relevant evidence, including evidence from the Consultant. Where there was ambiguity in the evidence, NHS BSA took steps to clarify this. For instance, in his report the IRMP said: "[The Consultant] also provided a response to a request for further medical evidence, dated 9 April 2018. In answer to the question: is my understanding of your opinion as to [Mr E's] prognosis in 2015 correct (i.e. that the prognosis related to the date in October 2015)? [the Consultant] has responded, yes." That was the correct process to follow.

15. Mr E has made several points about the date on which permanency of his condition can be established. However, the key point is that permanency has not in fact been established in line with the Regulations and the ill-health retirement. In his report in August 2019, the IRMP said:

> "The medical evidence provided by [the Consultant] indicates the expected prognosis at the time was good and [the Consultant] stated that "50% resolve within two years and 70% resolve spontaneously after eight years". This would indicate a clear expectation, at that time, that the condition would more likely than not resolve before [Mr E's] normal pension age. The medical evidence therefore indicates that, at the time of leaving employment, even in the absence of future treatment, [Mr E's] incapacity was unlikely to have been permanent..."

16. Having considered the IRMP's report, NHS BSA at stage two of the IDRP gave its reasons for rejecting Mr E's claim, as outlined at paragraph 7 above. Briefly, it agreed with the IRMP's view that the Consultant's comments indicated a "clear expectation" that, at time of leaving employment, even with no further treatment, Mr E's condition was more likely than not to resolve before age 67. Accordingly, and on balance of probabilities, its view was that Mr E was not permanently incapable of doing his former job or a similar qualifying job at the time of leaving employment.

17. NHS BSA was required to consider all relevant information and disregard all irrelevant information. However, the question how much weight to attach to any of the evidence is for NHS BSA to decide. I note Mr E is unhappy NHS BSA did not explain what evidence it gave weight to in rejecting his claim. However, it is clear from the stage two decision that it gave most weight to the IRMP's opinion. That is, that the Consultant's comments indicated a clear expectation that, as at the time of leaving employment, Mr E's condition was more likely than not to resolve before age 67 even without further treatment.

18. I appreciate Mr E believes that the decision-maker ought to specifically question the IRMP and/or the Consultant on when permanency of his condition can be established. He suggests that, in line with the medical evidence, this should be February 2010, when the condition started, or April 2015, when it was diagnosed. However, as advised in the previous Determination, the question to be addressed by NHS BSA is not whether Mr E is suffering from a permanent medical condition. The question to be addressed is whether his incapacity for (a) efficiently discharging the duties of his former employment or (b) engaging in regular employment of like duration, was deemed to be "permanent" at the time of leaving employment (with "permanent" specifically meaning more likely than not to last until age 67).

19. Based on all available evidence, no medical practitioner has confirmed that Mr E met those criteria at the time of leaving employment. Accordingly, I do not find that there has been an error in the way NHS BSA has re-considered Mr E's claim.

20. Mr E has mentioned 91(2)(e) of the Regulations. This provides that "any other matter the scheme manager thinks appropriate" be considered as part of the application. In this case, Mr E says this means that the IRMP and NHS BSA should further consider, and agree, when permanency of his condition can be established. However I find that this simply gives NHS BSA discretion to seek and obtain further evidence if it deems this appropriate. I do not find that NHS BSA has breached any rules or regulations in this regard.

21. Therefore, I do not uphold Mr E's complaint.

22. I understand Mr E's concern that someone should consider when the permanency of his condition was in fact established. I should clarify that in this determination I am considering whether NHS BSA dealt correctly with his original application for benefits. I can interfere with that decision only if it failed to take account of the evidence of his prognosis as it appeared at the date he left service, without applying the benefit of hindsight to the assessment made at that time. Nothing in this determination prevents Mr E from making an application for payment of benefit out of deferred service from a later date, with reference to evidence of his prognosis as it appeared at that later date.

Karen Johnston

Deputy Pensions Ombudsman
6 May 2020

Appendix

The NHS Pension Scheme Regulations 2015 (SI2015/94) (as amended)

23. As at the date Mr E's employment ceased, regulation 90 provided that:

"(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 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.

(4) ...

(5) In paragraph (3)(b), "regular employment of like duration" means -

(a) …

(b) in any other case, where prior to ceasing NHS employment, M was employed -

(i) on a whole-time basis, regular employment on a whole-time basis;

(ii) on a part-time basis, regular employment on a part-time basis, regard being had to the number of hours, half days and sessions M worked in the employment …"

24. Regulation 91 provided:

> "(1) For the purpose of determining whether a member (M) is permanently incapable of discharging the duties of M's employment efficiently, the scheme manager must -
>
> (a) have regard to the factors in paragraph (2), no one of which is to be decisive; and
>
> (b) disregard M's personal preference for or against engaging in the employment.
>
> (2) The factors mentioned in paragraph (1)(a) are -
>
> (a) whether M has received appropriate medical treatment in respect of the infirmity;
>
> (b) M's mental capacity;
>
> (c) M's physical capacity;
>
> (d) the type and period of rehabilitation it would be reasonable for M to undergo in respect of the infirmity, regardless of whether M has undergone the rehabilitation; and
>
> (e) any other matter the scheme manager thinks appropriate.
>
> (3) For the purpose of determining whether M is permanently incapable of engaging in regular employment of like duration as mentioned in paragraph (3)(b) of regulation 90, the scheme manager must -
>
> (a) have regard to the factors in paragraph (4), no one of which is to be decisive; and
>
> (b) disregard the factors in paragraph (5).
>
> (4) The factors mentioned in paragraph (3)(a) are -
>
> (a) whether M has received appropriate medical treatment in respect of the infirmity;
>
> (b) such reasonable employment as M would be capable of engaging in if due regard is given to -
>
> (i) M's mental capacity;
>
> (ii) M's physical capacity;
>
> (iii) M's previous training; and
>
> (iv) M's previous practical, professional and vocational experience,

irrespective of whether or not such employment is available to M.

(c) the type and period of rehabilitation it would be reasonable for M to undergo in respect of the infirmity, regardless of whether M has undergone the rehabilitation, having regard to -

(i) M's mental capacity; and

(ii) M's physical capacity;

(d) the type and period of training it would be reasonable for M to undergo in respect of the infirmity, regardless of whether M has undergone the training, having regard to -

(i) M's mental capacity;

(ii) M's physical capacity;

(iii) M's previous training; and

(iv) M's previous practical, professional and vocational experience; and

(e) any other matter the scheme manager thinks appropriate.

(5) The factors mentioned in paragraph (3)(b) are -

(a) M's personal preference for or against engaging in any particular employment; and

(b) the geographical location of M.

(6) In this regulation -

“appropriate medical treatment” means such medical treatment as it would be normal to receive in respect of the infirmity, but does not include any treatment that the scheme manager considers -

(a) that it would be reasonable for M to refuse;

(b) would provide no benefit to restoring M's capacity for -

(i) discharging the duties of M's employment efficiently for the purposes of paragraph (2)(c) of regulation 90; or

(ii) engaging in regular employment of like duration for the purposes of paragraph (3)(b) of that regulation;

(c) that, through no fault on the part of M, it is not possible for M to receive before M reaches normal pension age.

“permanently” means until M attains M's prospective normal pension age; and

"regular employment of like duration" has the same meaning as in regulation 90."

Paragraph 14 in Part 6 of Schedule 3 provides:

"(1) Except as otherwise provided by these Regulations, any question arising under this scheme is to be determined by the scheme manager.

(2) Any such disagreement as is referred to in section 50 of the 1995 Act (resolution of disputes) must be resolved by the scheme manager in accordance with any arrangements applicable under that section."

Paragraph 15 provides:

"(1) The scheme manager may make arrangements for functions under this scheme in relation to decisions to which sub-paragraph (2) applies that are exercisable by the scheme manager to be discharged by -

(a) a medical practitioner (whether practising alone or as part of a group) whom the scheme manager has approved to act on the scheme manager's behalf; or

(b) a body (incorporated or unincorporated) which -

(i) employs medical practitioners (whether under a contract of service or for services); and

(ii) is so approved.

(2) This paragraph applies to a decision as to a person's health or degree of physical or mental infirmity that is required for the purposes of this scheme and, in particular, a decision required for the purposes of -

(a) …

(c) regulation 90(2)(c) or (3)(b) (early retirement on ill health: active members); …

(3) In relation to such a decision, the scheme manager may require a person entitled or claiming to be entitled to benefit under this scheme to submit to a medical examination by a medical practitioner selected by the scheme manager.

(4) The scheme manager must also offer the person an opportunity to submit a report from the person's own medical adviser following an examination of the person by the medical adviser.

(5) In taking a decision mentioned in sub-paragraph (1), the scheme manager must take into consideration both -

(a) the report mentioned in sub-paragraph (4); and

(b) the report of the medical practitioner who carries out the medical examination mentioned in sub-paragraph (3).”