CAS-52639-R1X4

Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Pension Scheme (**the Scheme**)
Respondent	NHS Business Services Authority (**NHS BSA**)

Outcome

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

Complaint summary

2. Mrs N's complaint concerns NHS BSA's decision not to award her an early payment of deferred benefits (**EPDB**) on the grounds of ill health.

Background information, including submissions from the parties

3. Mrs N was employed by the NHS as a full-time nurse until she left service on 23 November 1997. She then continued working as a nurse in the private sector. She is a deferred member of the Scheme.

4. In December 2019, Mrs N applied for EPDB on the grounds of ill health. At the time of her application, she was aged 53. Mrs N completed part 1 of form AW240, which was intended for deferred members of the Scheme to apply for EPDB, and her General Practitioner (**the GP**) completed part 2, as Mrs N's attending doctor.

5. At the time of Mrs N's application, Regulation L1(3)(b) of The National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended), (**the 1995 Regulations**) provided:

> "The member shall be entitled to receive the pension and retirement lump sum before age 60 if –
>
> …the Secretary of State is satisfied that the member is suffering from mental or physical infirmity that makes him permanently incapable of engaging in regular employment of like duration…"

6. Summaries of the medical evidence relating to Mrs N's case are provided in Appendix One.

7. On 26 February 2020, the first instance decision maker Medigold Health, the Scheme's Medical Adviser (**SMA**), made a decision refusing Mrs N's application. In its decision, the SMA said:-

   - In considering whether a medical condition would be likely to give rise to permanent incapacity, it first considered whether, in the absence of future treatment, the incapacity would be likely to be permanent and, if so, whether future treatment would be likely to alter this.
   - 'Permanent' meant at least until the normal pension age of 60.
   - Mrs N's current and future fitness for nursing duties was not relevant for her application. What was relevant was her likely capacity for any kind of regular full-time employment until she reached age 60.
   - Permanent incapacity for regular employment of like duration was not supported by the medical evidence provided. On the balance of probabilities, the medical criteria for the EPDB had not been satisfied.
   - In its opinion, Mrs N did not have a physical or mental infirmity which currently gave rise to incapacity for regular employment of like duration.

8. On 1 March 2020, Mrs N appealed by invoking the Scheme's two-stage Internal Dispute Resolution Procedure (**IDRP**). In her submissions, she said in summary:-

   - Since October 2019, she had been unable to work as a nurse.
   - She experienced pain in her hips, which became so severe that she had been unable to mobilise or carry out her daily activities. She could not live without care and support from her partner.
   - After each investigation of her problems, the GP discussed the results with her. When an X-ray showed osteoarthritis in both hips, the GP said that her condition was bad enough to have hip replacement on both hips. Due to the severity of the pain, she was prescribed numerous analgesia and anti-inflammatory medication, none of which worked.
   - After an appointment in November 2019, she was offered crutches to mobilise. She declined because any form of mobilising was painful. The pain had been so bad that, on one occasion, she had to go to the Accident and Emergency department and receive morphine.
   - The SMA's report had stated that she could work in a desk job. Sitting at a 90-degree angle for hours exacerbated her pain. She would have to take more analgesia, which made her sleepy.
   - During a second MRI scan, in February 2020, the consultant said that he had never seen anything like that before. He advised her to try a crutch on her right

side to assist mobility in very short distances, but not for long distances as it exacerbated the pain.

- She was currently taking Tramadol, which made her very lethargic. She was no longer able to drive and she required assistance for bathing.

9. Prior to responding to Mrs N under stage one of the Scheme's IDRP, NHS BSA asked the SMA to advise on whether the criteria for EPDB were likely to have been met at the time of Mrs N's original application.

10. On 12 March 2020, the SMA wrote to NHS BSA and said:-

- It noted that some of the medical reports that had been provided had been produced after Mrs N's application. It pointed out that changes in Mrs N's health after the application was made were not relevant to the determination of whether she satisfied the Scheme's definitions as of the date of her application.

- It had therefore not taken the subsequent course of Mrs N's illness into account. However, it had taken into consideration those elements of the reports that related to, or provided insight into, Mrs N's circumstances at the time of her application.

- Mrs N had not submitted any new medical evidence with her request for a review of its earlier decision. She was also critical of the original decision being made without input from her treating consultant.

- Mrs N did not actually see her consultant until February 2020, some two months after her application was made. When pension decisions were made retrospectively, which was what had to be done in this case, those decisions were generally made on the basis of the diagnosis that existed when the decision had to be made. So, it seemed unlikely that a report from the consultant at this stage would yield information that would lead to a different outcome to Mrs N's application, given that the application had to be based on her circumstances some two months before she first saw him.

- In its opinion, the relevant medical evidence indicated that, on the balance of probabilities, at the time of the original application Mrs N did not have a physical or mental infirmity that made her permanently incapable of regular employment of like duration. Because of this, the deferred benefit condition had not been met.

11. On 29 April 2020, NHS BSA sent Mrs N its stage one IDRP decision, declining her appeal. It concluded that it was unable to accept that she was suffering from a mental or physical infirmity that made her permanently incapable of engaging in regular employment of like duration to her former NHS employment. Consequently, she did not satisfy the conditions laid down in the 1995 Regulations for EPDB.

12. On 13 May 2020, Mrs N appealed under stage two of the Scheme's IDRP. She said that she was disappointed to read in the stage one response that no new medical evidence had been submitted. She had sent the consultant's report by registered

post, but it seemed that evidence was never reviewed. Mrs N included a copy of a report by the consultant, dated 4 March 2020.

13. NHS BSA asked the SMA to review Mrs N's case in light of the additional evidence.

14. On 27 May 2020, the SMA wrote to NHS BSA and gave its advice regarding Mrs N's appeal. It said in summary:-

    - The consultant's report was not available when it reviewed Mrs N's appeal in March 2020, and so it was not able to take it into account in its previous advice. The SMA understood that the report was received by NHS BSA before the outcome of stage one of the IDRP process had been finalised and that NHS BSA wished to know whether the information in the report altered the earlier advice.

    - In its original advice, the SMA had already said that Mrs N was unfit for regular full-time employment, this being of like duration to her former NHS role, at the time of her original application. The consultant's report did not alter that opinion.

    - It had no doubt as to Mrs N's incapacity at the time of her application. However, the outcome of her claim was not based upon her incapacity at the time of the application. It was based on whether her incapacity at the time of her application was likely to have been permanent.

    - The consultant's report provided additional evidence to support the position that, at the time of her application, Mrs N's incapacity for regular employment of like duration was unlikely to be permanent. This was because her incapacity was likely to either resolve spontaneously or resolve in response to future treatment before she reached normal pension age.

15. On 28 May 2020, NHS BSA turned down Mrs N's appeal, again under stage one of the Scheme's IDRP. The reason a stage one response was issued again was because NHS BSA had failed to take into account the consultant's report in its earlier decision.

16. On 5 November 2020, Mrs N appealed under stage two of the Scheme's IDRP. She said that all her hospital appointments had been postponed due to COVID-19. In October 2020, she had a scan but had yet to see the consultant to discuss the results. She added that there had been no changes to her symptoms and that she still experienced severe pain.

17. On 26 November 2020, the SMA wrote to NHS BSA and gave its advice regarding Mrs N's appeal. It said in summary:-

    - It had not taken the subsequent course of Mrs N's illness into account, because changes in her health after her original application was made were not relevant to the determination of whether she satisfied the pension scheme definitions as of the date of application.

- The key issue in relation to Mrs N's application was whether her incapacity was likely to have been permanent. The evidence indicated, on balance, that even if Mrs N's symptoms did not settle spontaneously, she was likely to benefit from a total hip replacement.

- At the time of her original application, it would have been more likely than not that future treatment would have altered the permanence of her incapacity and enabled her to regain fitness for regular full-time employment. Such employment would include work across the general field of employment, including work of a sedentary nature.

- In its opinion, at the time of the original application Mrs N had a physical or mental infirmity which gave rise to incapacity for regular employment of like duration. But this incapacity was unlikely to have been permanent.

- Consequently, the criteria for EPDB were unlikely to have been met.

18. On 5 January 2021, NHS BSA replied to Mrs N's stage two IDRP appeal. It said in summary:-

    - It had taken advice on medical matters from a panel of professionally qualified and experienced occupational health doctors, who also had access to specialist advice where necessary. The SMA's medical advisers were all trained in the legislative requirements of the Scheme.

    - In order to award an ill health pension in the above circumstances, NHS BSA must be satisfied that the applicant was permanently incapable of any kind of employment of like duration, because of illness or injury; not just their previous NHS job.

    - The key word was 'permanent' and in that context it meant until the Scheme's normal retirement age of 60. The Scheme benefits were for life and, once awarded, could not be medically reviewed or withdrawn, even if the applicant made a full recovery.

    - Because of this, NHS BSA had to be as reasonably sure as it could be that the applicant's inability to work was permanent.

    - It was unable to accept that Mrs N was permanently incapable of regular employment of like duration to her former NHS employment. Consequently, she did not satisfy the conditions laid down in Regulation L1(3)(b) of the 1995 Regulations.

19. In her submissions to The Pensions Ombudsman (**TPO**), Mrs N said in summary:-

    - The SMA did not have an accurate account of her condition or the relevant updated report by the consultant at the time of the assessment of her application. It relied on a report produced by a Registrar, who saw her at a clinic. The consultant's subsequent report was ignored.

- As she had not had a diagnosis or prognosis, the whole picture of her condition had been ignored and wrongly assessed.

- NHS BSA said that she could do a desk job. Unfortunately, because of the aspects to her condition she had already highlighted, this would be impossible. To sit on a chair at 90 degrees would be one of the worst positions for her hips. Due to the side effects of the analgesia, her concentration span was limited.

- If she worked from home, her condition would remain the same. This would be unfair to any employer, as her job performance would be poor. She had considered retraining, but she did not have the concentration and the ability to sit for the length of time required to study.

- She had spoken to the consultant regarding her ability to work at a desk job. He said that she could not, which was in one of the letters sent to NHS BSA.

- She would love to be able to work and earn money. She was claiming benefits which was something she had never done before in her life. These benefits were just enough to live on.

- The consultant had said that she would eventually need two hip replacements, but the waiting time for this was over two years, due to COVID-19 causing a backlog.

20. In its submissions to TPO, NHS BSA said in summary:-

- It had declined Mrs N's application for EPDB because it did not consider that she was permanently incapable of engaging in regular employment of like duration.

- Even though it considered evidence which post-dated the date of the original application, this was done only to the extent that it related to or provided an insight into the medical condition and circumstances as of the date of the application.

- It had considered Mrs N's application, taking into account and weighing all relevant evidence and nothing irrelevant. It had taken advice from the proper sources, such as the SMA, considered and accepted that advice and arrived at a decision that it believed not to be perverse.

- It accepted that it initially failed to take into consideration the report dated 4 March 2020, when reaching the stage one IDRP decision. Once Mrs N alerted NHS BSA to this oversight, the application was remitted back to the SMA for its consideration.

- The SMA's recommendations and rationales were founded on the correct interpretation of the appropriate Scheme Regulations. They took into account relevant evidence and information and were not perverse.

- The fact that Mrs N did not agree with the conclusions drawn or the weight attached to various pieces of evidence, did not mean that any conclusion was necessarily flawed.

Adjudicator's Opinion

21. Mrs N'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.

22. Members' entitlements to EPDB due to ill health were determined by the Scheme Regulations. The Scheme Regulations determined the circumstances in which members were eligible for ill health benefits, the conditions they must satisfy, and the way in which decisions about ill health benefits must be taken.

23. Under Regulation L1(3)(b), to be eligible for an EPDB on the grounds of ill health, Mrs N must be deemed permanently (that was to age 60) incapable of engaging in regular employment of like duration to her NHS employment. Such employment did not have to be available or offered to Mrs N. She just had to be capable of doing it.

24. The SMA was not under my jurisdiction. It was answerable to its own professional bodies and the General Medical Council (**GMC**). NHS BSA, as the ultimate decision maker, would be expected to seek clarification in the event of an error or omission of fact on the part of the SMA.

25. The SMA's opinions pertained to Mrs N's health at the time of her application for EPDB. The SMA's reports demonstrated that the SMA was aware of the eligibility criteria under Regulation L1(3)(b). There was nothing to suggest that the Scheme Regulations had been misinterpreted.

26. The available information also showed that the SMA was aware of Mrs N's full-time employment with the NHS prior to leaving service, as well as the number of years remaining to her normal pension age in the Scheme.

27. The SMA considered the available medical evidence and concluded that it did not show that Mrs N was permanently incapable of undertaking other employment to her former full time nursing role. The Adjudicator did not find any errors or omissions of fact, which would suggest that NHS BSA should not have accepted the SMA's advice.

28. A difference of medical opinion, say between the SMA and Mrs N's treating doctors, was not sufficient for the Pensions Ombudsman (**the PO**) to say that NHS BSA's acceptance of the SMA's opinion meant that its decision had not been properly made.

29. Mrs N retained the right to be considered under the 1995 Regulations for EPDB. She could submit a new application at any time before age 60. Consideration would then be given to her current health conditions.

30. Mrs N did not accept the Adjudicator's Opinion and in response, she provided further comments. In summary she said:-

    - She was still waiting for two hip replacements. Due to COVID-19, there is a waiting list for this operation. In addition, she had been diagnosed with another

condition which required treatment and recovery before she could be considered for a hip replacement operation. She also had a series of additional medical problems.

- Under normal circumstances, her hip replacement operations would have been completed by now and she would have been able to return to work. She had worked for nearly 40 years as a nurse and never thought she would have to live off benefits. She cannot understand why she cannot receive her Scheme pension now. If she was a healthy nurse working for the NHS, she would have been able to receive her pension from age 55 and still work part-time for the NHS.

- The SMA had been hasty with its decision when it said that Mrs N's problem would probably resolve itself over time. She is concerned about this decision, because the SMA never spoke to her, it was unaware of her past medical history and did not contact her consultant. The SMA was not in a position to give a prognosis, when her own consultant was unable to give a timeframe due to the severity of the condition.

- She found the procedure of claiming her Scheme pension misguided and unfair. On numerous occasions, she asked how to access her benefits online, and was told that she could not do so. She was unaware how much her pension was, as she had been told to access the information online. There was also no explanation of what was entailed in the various stages of her claim.

- NHS BSA misplaced some important and confidential information. When she asked it to forward the consultant's report to the SMA, NHS BSA initially ignored this and made a decision without that evidence. She had to appeal as a result of this.

- She was not informed that her condition could be reviewed again, within three years of her claim. She had been trying to explain to NHS BSA that a time frame could not be placed on the recovery of her type of illness. She was not offered a review at the time.

- She recently contacted NHS BSA to discuss the possibility of a re-assessment of her claim. NHS BSA was not answering the telephone due to high volumes of work. Its website did not explain clearly which form she needed to complete and submit.

- This lengthy process was not helping her when she really needed her Scheme pension due to ill health. She had raised her concerns over NHS BSA's process, the fact that she was unable to access information about her pension online and that she had never received a yearly statement of her Scheme benefits.

- She feels that, because she left the NHS, she has no right to access or even obtain her pension. This should not make any difference as she worked for her pension.

- NHS BSA does not know the series of illnesses she had since her initial application.

31. Mrs N's complaint was passed to me to consider. I have noted Mrs N's further comments but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Ombudsman's decision

32. It is clear from Mrs N's submissions and her correspondence with TPO that she is still experiencing significant issues with her health. However, the decision not to award her EPDB on the grounds of ill health under the Scheme Regulations must be considered by reference to her health at the time she submitted her application, in December 2019. In particular, the decision must be considered by reference to the likelihood of her engaging in regular employment of like duration before normal pension age which in December 2019 it was expected that she could. . It is not a question of applying hindsight.

33. It is for this reason that the latest medical information Mrs N has provided TPO with, giving an update regarding her health, does not assist me in determining her complaint.

34. In order for her to qualify for EPDB under Regulation L1(3)(b), the expectation in 2019 must have been that Mrs N would be deemed permanently incapable of engaging in regular employment of like duration. This meant any regular full-time employment. Permanently meant likely, on the balance of probabilities, to last at least until her prospective normal pension age of 60.

35. 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, who was the decision maker under the Scheme Regulations.

36. The SMA reviewed Mrs N's case on several occasions and concluded that she did not meet the criteria for an EPDB. The advice did not appear to be inconsistent with the medical evidence submitted by Mrs N's treating doctors, including the consultant's report of March 2020. I find no reason why NHS BSA should not have accepted the advice from the SMA.

37. I am aware that Mrs N does not agree with the conclusions reached by the SMA and NHS BSA. It is not my role to review the medical opinions provided by the SMA but to look at the decision making process and my review of the SMA's reports is to determine whether or not there was any reason why NHS BSA should not have relied on them in reaching a decision.

38. This would include errors or omissions of fact, irrelevant matters taken into account or a misinterpretation of the relevant regulations. The SMA's suggestions concerning treatment or its views on the likely outcome of treatment would not normally be something I would expect NHS BSA to query. If, for example, there was an obvious

disparity between the SMA's view and those of Mrs N's treating doctors, I would expect this to be explained to NHS BSA and to Mrs N. However, I have seen no such obvious disparity in Mrs N's case.

39. In summary, I find that there was no reason why NHS BSA should not have relied on the advice it received from the SMA in reaching its decision. Its decision is supported by that advice and is compliant with the Scheme Regulations. The fact that Mrs N's recovery since then has not been as positive as might have been expected in 2019, does not undermine NHS BSA's decision.

40. In her latest submissions, Mrs N has referred to difficulties in viewing her Scheme benefits online, as well as difficulty in obtaining information on submitting a new application for EPDB. These issues had not been previously raised as part of Mrs N's current complaint and I do not consider that they should be addressed in this complaint. Mrs N should first raise these issues directly with NHS BSA and allow it to respond, before deciding on whether to refer them to TPO for further investigation under a new complaint.

41. Mrs N may also wish to consider submitting a fresh application for an EPDB by providing medical evidence reflecting her current health condition.

42. I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman
14 September 2022

Appendix One

Summary of the medical evidence

43. In a letter dated 22 November 2019, Miss A Nicolas (SpR in Orthopaedics) said:-

- Mrs N had a three-month history of gradually worsening left hip pain, with no history of trauma, but she was struggling to mobilise. She had attended the Accident and Emergency department, as well as her GP on a number of occasions, trying a multitude of painkillers without success.
- X-rays of the pelvis, from October 2019, showed early osteoarthritic changes on both hips.
- On 2 November 2019, a CT scan of the pelvis showed no cause for the left hip pain. A subsequent MRI scan showed bone oedema in the left hip, with a differential diagnosis of infection and regional migratory osteoporosis or avascular necrosis.
- Blood tests from 2 November 2019 were normal and were repeated on the day.
- On examination, Mrs N had flexion to 90 degrees, beyond which it became painful. She also had pain on external rotation, but internal rotation was satisfactory. She was neurovascularly intact. There was a full range of knee movement with no tenderness on palpation of the joint lines. Mrs N's ACL and PCL, medial and collateral ligaments were intact.
- Repeat X-rays were taken and were similar to those of October 2019.
- She had told Mrs N that pain management and mobilising with crutches for the time being was the most appropriate course of treatment, as there was nothing she could offer her surgically at this stage.
- Mrs N was offered a referral to physiotherapy and crutches, but Mrs N declined.

44. In a letter to the GP, dated 23 December 2019, Dr Slavin (Consultant Occupational Health Physician), explained that he had been asked to provide advice in connection with Mrs N's application, in his capacity as medical adviser to NHS BSA. He also said:-

- His understanding was that Mrs N had been working as a nurse. However, the Scheme would need evidence that Mrs N was unfit for work, not just as a nurse, but potentially as an administrator or somebody who would work in a seated capacity.
- He noted that Mrs N had been referred to an orthopaedic surgeon and wanted to see any correspondence the GP had received from the surgeon, and which outlined what treatment was likely. He also required to see any comments about

Mrs N's prognosis and the GP's assessment as to what her functional capacity was.

- On the basis of the AW240 form submitted, it was likely that prosthetic surgery would restore Mrs N's mobility considerably. It was also likely that she would be able to work in an administrative capacity.

45. In a medical report sent to Dr Slavin, dated 21 February 2020, the GP said:-

- Mrs N had been certified as unfit for regular employment, due to the pain in her left hip and her right knee. She had been referred to a specialist for these.

- She had been to Accident and Emergency and had X-rays and MRI scan for the pain in her left hip and right knee. She had also attended the fracture clinic.

- She had been referred to orthopaedics, but the general level of interaction was unknown.

- She was unlikely to recover. A specialist opinion by a consultant was expected.

46. In its letter declining Mrs N's application for EPDB, dated 26 February 2020, the SMA said:-

- The specialist evidence was that the early osteoarthritic changes in Mrs N's hips were not responsible for the hip pain that she was experiencing. Pending further tests, the diagnosis was unclear. The treatment plan was for mobilisation with support and pain management, neither of which had yet taken place. It was unclear why Mrs N had declined this treatment plan.

- The evidence was that Mrs N was currently, if temporarily, unfit to work as a nurse. However, the evidence was, on balance, compatible with current and future fitness for a less physically demanding type of regular full-time employment, such as a desk-based sedentary role, with appropriate support and reasonable adjustments under disability legislation, if required. That is, she was considered currently medically fit for regular employment of like duration, regard being had to the number of hours, half days and sessions she worked in her last NHS employment.

- The diagnosis, treatment plans and long-term prognosis remained unclear. The presence of early osteoarthritis on Mrs N's X-rays was not consistent with her degree of perceived symptoms. Even if it were to be accepted that she was currently unfit for any kind of regular full-time work, such incapacity would be unlikely to continue at least until her 60th birthday, such that it might be considered permanent.

- Because of this, permanent incapacity for regular employment of like duration was not supported by the medical evidence. The medical criteria for the deferred benefit condition were not satisfied, on the balance of probabilities.

47. In a report dated 4 March 2020, Mr S Scott (Consultant Orthopaedic Surgeon) said:-

- Mrs N had severe left hip pain due to the diagnosis of probable transient bone marrow or early avascular necrosis.
- Her mobility was extremely limited at present. She was able to walk around her home using furniture for support, but could manage only very short distances outdoors, with her partner supporting her.
- She had sleep disturbance and required regular analgesia.
- It was unclear what treatment would be suitable for Mrs N. If her symptoms settled spontaneously, this would be within the next six to twelve months. If her symptoms continued, she might need hip replacement.
- In his opinion, Mrs N was not fit for work at the present time, even in a sedentary occupation, due to the significant limitations of her mobility and the large doses of analgesia she required.

48. On 12 March 2020, Dr Evans (Consultant Occupational Physician) wrote to NHS BSA, on behalf of the SMA, to advise whether the criteria for EPDB were likely to have been met at the time of the original application. He said:-

- The medical evidence was that, at the time of the original application, Mrs N was unfit for regular full-time employment, this being of like duration to her former NHS role. Her incapacity was the result of bilateral hip pain and also right knee pain. The cause of Mrs N's symptoms was, and remained, unclear. However, it appeared from her account that she had been unable to work since autumn 2019, as a result of her symptoms.
- It also appeared that these symptoms were progressively getting worse and that they had persisted despite regular analgesia. At the time of the original application, Mrs N was, to a large extent, house-bound because of her symptoms. She required assistance with daily activities. Her mobility was compromised.
- In November 2019, the GP had stated that Mrs N's symptoms were the result of osteoarthritis. However, at that time, she had not had the opportunity of assessment by an orthopaedic surgeon. She was subsequently seen by Miss Nicolas, a specialist registrar in orthopaedics, on 22 November 2019.
- It was evident from the documents provided that Mrs N was dissatisfied with the consultation with Miss Nicolas. However, in her report, Miss Nicolas gave three possible diagnoses for Mrs N's symptoms. These were infection, regional migratory osteoporosis and avascular necrosis. Blood tests undertaken at the start of November 2019 were normal. While Miss Nicolas wished to repeat these for completeness, she indicated that if these blood tests were normal, then the likely diagnosis would be either transient regional migratory osteoporosis or avascular necrosis.

- He had no reason to question Miss Nicolas' diagnoses. It was therefore appropriate to consider the application on the basis that the extant diagnosis at the time of the application was one of these latter two conditions. Regional migratory osteoporosis was an uncommon disorder, the cause of which was unknown. It was his understanding that the alternative differential diagnoses based on MRI imaging were infection or necrosis, as indicated by Miss Nicolas. He also understood that trauma was also a differential diagnosis for the imaging appearances. However, there was no history of trauma in this case.

- It was his understanding of the literature that the natural history of regional migratory osteoporosis was that it was a self-limiting condition. Symptoms generally resolved within a period of 24 months, although the radiographic changes did persist for some months after symptoms had been resolved. The condition could recur.

- If one considered that the extant diagnosis at the time of the application was regional migratory osteoporosis, then it followed from this that the condition would have been expected to resolve within a two-year period. At the time of the application, Mrs N was over six years from reaching scheme pension age. So, even in the absence of future treatment, her incapacity for regular employment of like duration would have been unlikely to have been permanent.

- If one considered that the extant diagnosis at the time of the application was avascular necrosis, then the course of this condition was quite different. Avascular necrosis did not usually resolve spontaneously. Therefore, any symptoms arising from this condition would, in the absence of future treatment, be likely to be permanent. Therefore, if one considered the extant diagnosis to be avascular necrosis, then at the time of the original application, in the absence of future treatment, any incapacity arising from this condition would have been likely to be permanent.

- Treatment of avascular necrosis depended upon the precise location and the extent of the condition. Initial treatment was often conservative in nature and consisted of reducing weight bearing and analgesia, which was the treatment approach recommended by Miss Nicolas. There was some evidence that drug treatments may be helpful. However, he understood that randomised studies of these drugs treatments had not been performed. Surgical treatment could be undertaken. However, it was his understanding that in the early stages of avascular necrosis there was no consensus as to the most appropriate surgical intervention. If the disease progressed to involve collapse of the femoral head, then the most appropriate intervention was hip replacement surgery. This generally resulted in restoration of function.

- Therefore, if Mrs N's symptoms were due to avascular necrosis, at the time of her application, it would have been more likely than not that future treatment would have restored her capacity to undertake regular employment of like duration, even if such employment was only of a sedentary nature. Given the time remaining

before Mrs N reached scheme pension age, the benefits of this treatment would have been likely to come about before she reached scheme pension age.

49. On 27 May 2020, Dr Evans wrote to NHS BSA and gave his opinion on Mr Scott's report of 4 March 2020. He said:-

- Mr Scott also offered two differential diagnoses. These were transient bone marrow, by which he presumed he meant transient bone marrow oedema syndrome, and avascular necrosis.

- Avascular necrosis was one of the differential diagnoses put forward by Miss Nicolas. Miss Nicolas' other differential diagnosis was transient regional migratory osteoporosis. Transient regional migratory osteoporosis was characterised by joint pain and the presence of bone marrow oedema on MRI imaging. Bone marrow oedema was an MRI finding. The terms 'transient regional migratory osteoporosis' and 'transient bone marrow oedema syndrome' were describing the same clinical condition.

- Mr Scott and Miss Nicolas therefore agreed on the differential diagnosis for the condition giving rise to Mrs N's symptoms and incapacity.

- Mr Scott advised that Mrs N's symptoms might resolve spontaneously, though he offered no opinion as to the probability of this. He was of the opinion that if the symptoms were going to resolve spontaneously, this was likely to be within the next six to twelve months. This was a shorter timescale than he (Dr Evans) had indicated in his previous report.

- His recollection was that he obtained this information from the medical literature. He gave greater weight to Mr Scott's view, as it was specific for Mrs N. In any event, if spontaneous recovery was going to occur, this would be well before Mrs N reached normal pension age, as this was not until 2026.

- If Mrs N's symptoms did not resolve spontaneously, then further treatment might be necessary which, as Mr Scott indicated, would be hip replacement surgery. In his (Dr Evans') previous report, he had explained that the benefits of this would be likely to be sufficient to enable Mrs N to undertake suitable full-time work before she reached Scheme pension age.

50. On 26 November 2020, Dr Payton (Consultant Occupational Health Physician) wrote to NHS BSA and gave his opinion following Mrs N's stage two IDRP appeal. He said:-

- The medical evidence was that Mrs N was able to continue working as a nurse until 2019, but developed gradually worsening left hip pain and struggled to mobilise. X-rays of 30 October 2019 showed early osteoarthritic changes of both hips. A CT scan of the pelvis, on 2 November 2019, showed no cause for her left hip pain, but a subsequent MRI scan showed bone oedema in the left hip with a differential diagnosis of infection and regional migratory osteoporosis or avascular necrosis. Pain management and mobilising with crutches was advised as the most

appropriate cause of treatment, as there was nothing that could be offered surgically at that stage.

- Mr Scott advised that if Mrs N's symptoms were to settle spontaneously, this would be within the next six to twelve months. If spontaneous resolution was likely, then her incapacity was unlikely to have been permanent. However, Mr Scott indicated that Mrs N's symptoms might fail to resolve without further treatment. If further treatment was required, Mr Scott advised that she might require a total hip replacement.

- The evidence indicated, on balance, that even if Mrs N's symptoms did not settle spontaneously, she was likely to benefit from a total hip replacement. At the time of her original application, it would have been more likely than not that future treatment would have altered the permanence of her incapacity and enabled her to regain fitness for regular full-time employment. Such employment would include work across the general field of employment, including work of a sedentary nature. So, at the time of her application, Mrs N's incapacity was unlikely to be permanent, either because of spontaneous resolution of her symptoms or in response to treatment in the form of total hip replacement.