PO-12724

The Pensions Ombudsman

# Ombudsman's Determination

| | |
|---|---|
| **Applicant** | Mrs E |
| **Scheme** | NHS Pension Scheme |
| **Respondent(s)** | NHS Business Services Authority (**NHSBSA**) |

## Complaint Summary

Mrs E has complained that her eligibility for ill health retirement has not been considered in a proper manner. Mrs E is of the view that she is permanently incapable of doing her NHS job.

## Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against NHSBSA because it was entitled to accept the advice it received from its own medical advisers that Mrs E would, more likely than not, recover sufficiently to be able to carry out the duties of her NHS employment.

## Detailed Determination

### Material facts

1. Mrs E was employed as a Mental Health Staff Nurse. Her employment was terminated, with effect from 30 July 2015, on the grounds of medical incapacity.

2. At the time Mrs E's employment ceased, the National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended) applied. Extracts from the relevant regulation are provided in Appendix 2.

3. Mrs E was considered for ill health retirement in April 2015. First instance decisions have been delegated to the NHSBSA's medical advisers, **OH Assist**. It wrote to Mrs E, on 16 April 2015, informing her it was unable to accept her application for ill health retirement because, in the opinion of one of its medical advisers, she did not meet "the tier 1 condition". The NHS Pension Scheme provides for two tiers of benefit depending upon the level of the member's incapacity for employment. OH Assist quoted from its medical adviser's report.

4. Mrs E appealed against this decision under the Scheme's internal dispute resolution (**IDR**) procedure. Her case was reviewed by a different OH Assist doctor. The NHSBSA issued a stage one decision on 6 August 2015. It declined Mrs E's appeal. Having quoted the report from the OH Assist doctor, the NHSBSA said it could see no reason to disagree with his conclusion; that the tier 1 condition was not met.

5. Mrs E appealed further. Her case was reviewed by a third OH Assist doctor. The NHSBSA issued a stage two IDR decision on 3 February 2016. It declined Mrs E's appeal and said it was accepting the recommendation from the OH Assist doctor. It said the OH Assist doctor was of the view that, with the benefit of appropriate assessment and treatment, Mrs E's health should recover to the extent that she would be capable of carrying out the duties of her previous NHS employment, within her preferred field of training and experience, before the age of 60.

6. Summaries of the medical evidence relating to Mrs E's case are provided in Appendix 1.

7. Just prior to the termination of Mrs E's employment, she was offered a position on a different ward. Mrs E has explained that her employer conducted a "preference scoping" exercise and she was asked to list three wards where she would like to work. She has explained that no guarantee was given that her preferred choice could be accommodated. Mrs E has explained she was told, at her second stage sickness absence review on 16 January 2015, that she had been moved to an elderly mentally unwell ward. Mrs E has explained that she did not receive any written confirmation of this nor was she asked to sign a contract. She continued to receive sick pay.

8. The NHSBSA has said that Mrs E's employer has confirmed that she was informed about the move to another ward at a sickness absence review on 24 August 2014. The move was to have been effective from 8 December 2014. The NHSBSA has said

Mrs E's employer has confirmed that she was given formal notification of the move in a review meeting on 7 October 2014. It has said Mrs E's employer has explained,

> "[Mrs E] requested a move (to Older Adult Ward) and this was raised with management but there were no vacancies in this area. As the wards of … were undergoing a reconfiguration or [*sic*] services, opportunity arose for the requested move to take place."

**Mrs E's position**

9. The submissions made on Mrs E's behalf are summarised below:-

    - Mrs E was absent from work with severe stress and depression as a result of work-related stress.
    - She was unable to return to work because of her depression and was advised, by her employer, to apply for ill health retirement. Her application was declined on the grounds that the tier 1 and tier 2 criteria were not met.
    - There appears to have been a complete oversight of the nature of Mrs E's illness, what happened in the past and her work environment. This makes her permanently incapable of doing her NHS job.
    - Moving house and medication have helped but Mrs E is unlikely ever to become the strong, confident individual she was.
    - It is accepted that Mrs E may not meet the tier 2 condition, but she does meet the tier 1 condition inasmuch as she is permanently unable to do her NHS job. Even if a complete remission of her depression was achieved, there would be a significant risk of reoccurrence if she was exposed to similar stressful events.
    - Mrs E's case is complex and the NHSBSA does not appear to have taken this on board.
    - It is not clear that an appropriately qualified person has considered Mrs E's circumstances. She has been seen by a consultant forensic psychiatrist who disagrees with the view expressed by the NHSBSA.
    - Three years on since becoming ill, she continues to be prescribed a high 'maintenance dose' of antidepressants and is under review by her GP.

10. Having seen a provisional decision, Mrs E's representative made some further points:-

    - Mrs E went on sick leave on 24 August 2014 and did not have a sickness review. She did not receive official confirmation that a move to a different ward had been agreed. She had made a request to move. A copy of Mrs E's first sickness review has been provided showing the matter had been raised but not decided.

- Regardless of whether Mrs E was working in Older People's Care or Adult Care, she was not capable of carrying out the role of Staff Nurse at the time her employment was terminated.
- The OH Assist doctors are not specialists in psychiatry and have made assumptions about Mrs E's likely recovery. They do not appear to have taken account of the fact that she would still have been expected to respond to emergencies in adjacent Adult Acute wards. Her working environment would still have been complex and not conducive to her wellbeing. This was not considered by the OH Assist doctors but may have been picked up by a psychiatrist. A copy of a psychiatrist's report obtained in July 2017 has been provided.
- Mrs E should have been assessed in person by an occupational health doctor.

**The NHSBSA's position**

11. The submissions made by the NHSBSA are summarised below:-

    - It has properly considered Mrs E's application; taking into account and weighing up all the relevant evidence and no irrelevant matters. It has taken advice from appropriate sources; that is, the Scheme's medical advisers. It has considered and accepted that advice, and, as a result, it has come to a decision which it believes is not perverse.
    - It does not accept that Mrs E meets the tier 1 condition because the medical evidence shows that she is not permanently incapable of the duties of her NHS employment as a staff nurse. As the tier 1 condition has not been met, the tier 2 condition cannot be met.
    - The medical advisers' recommendations and rationales were founded on the correct interpretation of the Scheme regulations. They took into account relevant evidence and are not perverse.
    - In medical matters, decisions are seldom black and white. A range of opinions may be given from various sources; all of which must be considered and weighed. However, the fact that Mrs E does not agree with the conclusions drawn and the weight attached to various pieces of evidence does not mean that the conclusion is flawed.
    - The job description provided by Mrs E's employer, with her application for ill health retirement, was not taken into account when assessing her capability; other than to allow the medical adviser to understand the role she was performing when her sickness absence commenced.
    - Mrs E's employment on an adult acute ward ceased in January 2015 and she accepted a new role on an elderly mentally unwell ward. This has been confirmed by her employer.

- In August 2015, the medical adviser noted Mrs E had been relocated following a stress risk assessment. He said this would have been exactly the type of change Mrs E's GP had suggested and he could not see why she would not be unfit for such a role. This view was shared by the medical adviser who considered Mrs E's stage two appeal.
- Although Mrs E had accepted the new role and a phased return to work plan had been agreed, she was unable to return to work in the capacity of an elderly mental health Staff Nurse.

**Conclusions**

12. In order to be eligible for tier 1 benefits, Mrs E would have to have been, as at the date her employment ceased, "permanently incapable of efficiently discharging the duties of that employment". I acknowledge that Mrs E was unable to undertake her NHS duties at the time her employment ceased, but the question was whether this was likely to be permanent; that is lasting until her normal pension age.

13. Mrs E's application has been declined because OH Assist is of the view that, with appropriate treatment, Mrs E is likely to recover sufficiently to be able to return to nursing activities within her preferred field of training and experience. By this, OH Assist means care of the elderly mentally unwell.

14. Mrs E was not actively engaged in the care of the elderly mentally unwell at the time her NHS employment ceased. The role which she had been undertaking at the time she became unwell was as a staff nurse on an acute adult inpatient ward. OH Assist, in the advice provided in February 2016, acknowledged that a return to NHS employment dealing with this patient group would likely result in an exacerbation of her psychological illness. The advice that she did not meet the tier 1 condition was based on an expectation that Mrs E would recover sufficiently to return to the care of elderly mentally unwell patients.

15. The NHSBSA says Mrs E accepted a role on an elderly mentally unwell ward just prior to the termination of her employment. It sought clarification from Mrs E's employer and says the move was agreed in October 2014. The letter provided by Mrs E confirms she requested a move and it was supported by her manager. However, at that stage, the move was not confirmed because of an upcoming reconfiguration exercise. It appears agreement to the move was given at a later date. As a result, Mrs E's employment, from 8 December 2014, was as a staff nurse on an elderly mentally unwell ward; not on the acute adult inpatient ward. I note Mrs E has confirmed that she was not asked to sign a new contract of employment in connection with her move. However, a contract of employment does not have to be signed. I acknowledge that Mrs E did not perform this role because she never returned from sickness absence before her employment was terminated. Arguably, therefore, Mrs E's 'new' contract of employment was frustrated by her illness.

16. Perhaps another way of looking at the situation is in terms of reasonable adjustments. Mrs E was unable to perform her NHS duties as they stood but her employer was able to make a reasonable adjustment (by moving her to another ward) which would have enabled her to resume her NHS employment at some future date. I acknowledge that Mrs E was not able to return to her employment immediately or in the near future. However, regulation E2A calls for Mrs E to be permanently incapable of discharging the duties of her NHS employment; that is, her incapacity was expected to last at least until her normal benefit age. I find that the question to be addressed by the NHSBSA and its medical advisers was whether Mrs E was permanently incapable of discharging the duties of her adjusted role; that is, a staff nurse on an elderly mentally unwell ward.

17. It may help if I begin by explaining it is not my role to review the medical evidence and come to a decision of my own as to Mrs E's eligibility for tier 1 benefits. I am primarily concerned with the decision making process. I will review medical (and other) evidence in order to determine whether it supports the decision made. Amongst other things, I will consider whether the relevant rules have been correctly applied, whether appropriate evidence has been obtained and considered, and whether the decision is supported by the available relevant evidence. However, the weight which is attached to any of the evidence is for the NHSBSA to decide (including giving some of it little or no weight)[1]. It is open to the NHSBSA to prefer evidence from its own advisers; unless there is a cogent reason why it should not, or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted for the NHSBSA to reconsider.

18. The advice from the OH Assist doctors was that, with appropriate treatment, Mrs E could be expected to recover sufficiently to undertake the role of a staff nurse on an elderly mentally unwell ward before age 60. The doctors appear to have been well aware of the requirements of regulation E2A and applied the appropriate eligibility test. There do not appear to be any errors or omissions of fact in the reports they provided for OH Assist and/or the NHSBSA.

19. I note that Mrs E disagrees with the view of the OH Assist doctors. She has referred me to a report provided by a consultant forensic psychiatrist, in April 2016, and points out that he disagrees with the OH Assist doctors. I have not taken this report into account in assessing the decision making process followed by OH Assist and the NHSBSA because it was not available at the relevant time. In deciding whether there has been maladministration, I will take account only of evidence which was, or should have been, available to the decision makers at the time of the decision. It is for this reason that the latest psychiatrist's report, dated 2 July 2017, does not assist me in

---

[1] *Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

determining whether there was maladministration on the part of the NHSBSA in 2015/16.

20. This brings me to Mrs E's concern that her case has not been considered by an appropriately qualified person. By this, I take her to mean a consultant psychiatrist. The NHS Pension Scheme regulations are silent as to from whom medical advice should be sought. The OH Assist doctors are occupational health physicians. I find this to be appropriate when the question to be addressed is the member's capacity for work. I do not find that there was a requirement for the NHSBSA to seek advice from a consultant psychiatrist in Mrs E's case; particularly since she was not under the care of a consultant psychiatrist at the time.

21. In addition, I have already mentioned that it is for the NHSBSA to decide what weight it attaches to any of the available evidence. It would be prudent for it to proceed with caution if there was a disagreement on matters of diagnosis and treatment between its doctors and a specialist in the condition under consideration. It might be expected to seek clarification from its own doctors, as to why they disagreed with a specialist, before relying on their advice. However, this is not the case here. At the time of making its decision, NHSBSA was not faced with such a disagreement.

22. I note that Mrs E is still unwell. However, this, in and of itself, does not invalidate the advice provided by the OH Assist doctors. The question they were called upon to address was whether it was, on the balance of probabilities, likely that Mrs E would recover sufficiently before age 60. This is still some time off. In addition, the fact that the expected outcome does not come to pass does not mean that the advice was incorrect at the time it was required to be given.

23. I realise it will be disappointing for Mrs E but I do not find that there are grounds for me to uphold her complaint.

**Anthony Arter**
Pensions Ombudsman

6 September 2017

## Appendix 1

**Medical evidence**

**OH Assist, 16 April 2015**

24. The OH Assist doctor began his report by setting out his understanding of the ill health retirement eligibility criteria, including the meaning of permanent incapacity. He listed the evidence he had considered as: Part C of Mrs E's application form; information from her employer about sickness absence management and rehabilitation; and a personal account from Mrs E given in Part B of her application form.

25. The OH Assist doctor expressed the view that the "tier 1 condition" was not met. He gave the following reasons:-

    - It was evident from Mrs E's submission that there were serial and multiple issues of perceived work-related stress.
    - There was no evidence from Mrs E's employer that these issues had been addressed. No rehabilitation plan had been attempted.
    - Mrs E had been described as having a severe depressive episode without psychotic features and was being treated by her GP. If her symptoms were refractory to treatment, he would expect her to be referred to a specialist. This had not happened; although she had been referred to the community mental health team.
    - There was no evidence to indicate that Mrs E had been treated with "second line" medication. He would expect this to be the case for severe treatment-resistant depression.
    - Mrs E was 8 years and 8 months away from her normal retirement age of 60. This was an extended period of time in which she could undergo treatment and be expected to gain sustained improvement. It also provided time for the work-related issues to be resolved.

**OH Assist, 6 August 2015**

26. The OH Assist doctor began by setting out his understanding of the ill health retirement eligibility criteria, including the meaning of permanent incapacity. He listed the additional evidence he had considered as: a letter from an occupational health adviser dated 7 May 2015; and Mrs E's appeal submission dated 19 June 2015.

27. The OH Assist doctor expressed the view that the "tier 1 condition" was not met. He gave the following reasons:

    - The evidence indicated that Mrs E had mental health symptoms which were likely to relate to specific work matters. He referred to Mrs E's submission and

the report from the occupational health adviser recommending changes to her job description or redeployment.

- The occupational health adviser had referred to a report from Mrs E's GP which had indicated she would be expected to improve over a period of a year. The report had not been provided previously and he assumed it was provided for the occupational health service during Mrs E's absence.
- Mrs E had raised the fact that, as a Mental Health Officer, she would be able to access her benefits at age 55. The inability to work in her substantive role must be present until the age of 60.
- Mrs E's letter had indicated that she did not wish to seek specialist psychiatric assistance, despite describing significant functional deterioration.
- Mrs E had indicated that she could not return to her substantive role in a mixed adult care ward. However, the information provided indicated that she had been relocated to an older adult ward in December 2014, following a risk assessment. This would be likely to overcome her fears of returning to work in the mixed adult acute assessment unit. It would have enabled her to work within her area of expertise. This would have been the type of change suggested by her GP and the occupational health adviser. He could not see any reason why Mrs E would be unfit for such a role when her psychological symptoms were better controlled. Such a role could be therapeutic.
- Mrs E had not received any specialist psychiatric assessment and treatment. This would be merited if she continued to have symptoms which were beyond the scope of primary care. Her reluctance to engage with secondary care services was understandable, but not helpful to her health.
- Mrs E had more than 8 years in which to recover. He expected this to occur naturally or that she would be persuaded to engage with secondary care. Her symptoms would benefit from a prolonged psychotherapeutic approach, cognitive behavioural therapy or other secondary care service.

**OH Assist, 3 February 2016**

28. The OH Assist doctor began by setting out his understanding of the ill health retirement eligibility criteria, including the meaning of permanent incapacity. He listed the additional evidence he had considered as: a copy of the final formal review letter from Mrs E's employer dated 31 July 2015; and Mrs E's appeal submission dated 29 December 2015.

29. The OH Assist doctor expressed the view that the "tier 1 condition" was not met. He gave the following reasons:

- Mrs E's area of expertise was in the care of the elderly. She found herself in a role where she was caring for a mixed adult group and felt she did not have

the training or experience to deal with this. She perceived a number of issues at work which caused her increased feelings of stress. She was offered redeployment but did not feel able to take this up.

- During her sickness absence, Mrs E had been under the sole care of her GP, who had prescribed antidepressant medication. She was awaiting referral to a mental health specialist.
- It would be anticipated that, with full and appropriate treatment from secondary care mental health services, Mrs E's psychological health would gradually improve. This statement was based on the expected clinical evidence-based outcome in the majority of individuals treated appropriately for anxiety and depressive illness.
- Mrs E had experienced a state of anxiety and depression as a result of working in an adult mental health environment. She felt insufficiently experienced and trained to deal with the pressure of the particular patient group. Any attempt to return to that particular type of patient care was likely to result in an exacerbation of psychological illness. However, it would be expected that, with appropriate specialist assessment and treatment, Mrs E's normal psychological health would recover. This would enable her to return to nursing activities within her preferred field of training and experience; a staff nurse in the care of the elderly mentally unwell.

**Dr Nadkarni, 6 April 2016**

30. Mrs E has also provided a copy of a report, dated 6 April 2016, provided by a consultant forensic psychiatrist, Dr Nadkarni. This report was commissioned by Mrs E's solicitors in connection with a separate legal case against her former employer. It is not summarised here because it was not available at the time the NHSBSA was making its decision.

## Appendix 2

**The National Health Service Pension Scheme Regulations 1995 (SI1995/300)**

**(as amended)**

31. As at the date Mrs E's employment ceased, regulation E2A provided,

    "(1) …

    (2) A member to whom this regulation applies who retires from pensionable employment before normal benefit age shall be entitled to a pension under this regulation if -

    (a) … ; and

    (b) the member's employment is terminated because of physical or mental infirmity as a result of which the member is -

    (i) permanently incapable of efficiently discharging the duties of that employment (the "tier 1 condition"); or

    (ii) permanently incapable of regular employment of like duration (the "tier 2 condition") in addition to meeting the tier 1 condition."

32. "Permanently" was defined as the period to Mrs E's normal benefit age.

33. If the member met the tier 1 condition, retirement benefits were payable and calculated as if for normal retirement, without any reduction for early payment. If the member also met the tier 2 condition, the retirement benefits were calculated by reference to enhanced pensionable service.