

Ombudsman's Determination

Applicant	Mr N
Scheme	The New Airways Pension Scheme (the Scheme)
Respondents	New Airways Pension Scheme Trustees (the Trustees)

Complaint summary

1. Mr N's complaint is that the Trustees have failed to correctly follow the previous determination issued in July 2014 (the **Determination**) and have refused to award him an ill health pension.

Summary of the Ombudsman's decision and reasons

2. The complaint should not be upheld against the Trustees because (a) I am unable to find that they failed to correctly follow the Determination; and (b) I am unable to find that they misapplied the Rules, asked themselves the wrong question, took irrelevant matters into account and reached an improper decision when they decided that Mr N was not entitled to an ill health pension.

Detailed Determination

The relevant provisions of the Scheme

3. The Scheme is governed by the Consolidated Trust Deed and Rules dated 1 April 2008 (**the Rules**).

Clause 7 says:

“7 Management Trustees’ powers of decision

The Management Trustees shall have full powers to determine whether or not any person is entitled to any pension benefit or other allowance from the Fund in accordance with the provisions of the Trust Deed and of the Rules and any other claim made upon the Fund and all matters questions and disputes touching or in connection with the affairs of the Scheme and in deciding any question of fact they shall have full liberty to act upon such evidence or presumption as they shall in their absolute discretion think fit [though] the same may not be evidence legally admissible or a legal presumption. The Management Trustees shall also have full power to determine all questions or matters of doubt arising on the construction or operation of the Trust Deed or Rules or otherwise relating to the Scheme.”

Rule 14 says:

“14 Ill health pension

General

- a. If a Member’s employment with a Participating Employer is terminated before Normal Retirement Age by that Employer on the grounds of Medical Incapacity and the Principal Company so notifies the Management Trustees, the Member is entitled to an immediate yearly pension commencing on the date that he ceased to be employed.
- b. Except where a Pilot or an Officer and a Participating Employer have agreed that this paragraph (b) shall not apply, if before Normal Retirement Age a Pilot or an Officer –
 - (i) no longer holds an appropriate licence;
 - (ii) has lost that licence for medical reasons; and
 - (iii) in the opinion of the Principal Company’s medical adviser will not recover for the foreseeable future;his contract of employment will be terminated by the Participating Employer on the grounds of Medical Incapacity and the Principal Company will notify the Trustees accordingly.

- c. If a Member's employment with a Participating Employer has ceased before Normal Retirement Age, the Member may within three months of the date of cessation of his employment, make an application to the Principal Company for an immediate yearly pension on the grounds of Medical Incapacity.
- d. If the Principal Company grants such an application, it will notify the Management Trustees accordingly.
- e. For the purposes of paragraphs (a) to (d) Medical Incapacity [in the case of a pilot] means incapacity-
 - (i) from which the individual is unlikely to recover for the foreseeable future;
 - (ii) which prevents the individual from carrying out his normal duties even after reasonable adjustments."

Material facts

- 4. Mr N brought a previous complaint to us, which was about British Airways (**BA**) refusal to grant him an ill health pension and their, and the Trustees', failure to apply rule 14 of the Rules correctly. The Determination upheld the complaint against both BA and the Trustees. The conclusions were that the only provision that could apply in Mr N's case was rule 14c and the evidence upon which BA relied, and which the Trustees regarded as acceptable, was deficient. Consequently, the matter was referred back to the Trustees to decide, based on such medical evidence and advice as they may require, but without hindsight, whether on the date of his application Mr N met the definition of medical incapacity.
- 5. Following the Determination, the Trustees asked Dr Weddell for a report on Mr N. In his report of 15 August 2014, Dr Weddell said:
 - a. The medical diagnosis given by Dr Valmana, the consultant psychiatrist, on Mr N in the letters of 28 June and 14 September 2010 is moderate to severe depressive episode. The 14 September 2010 letter reported that Mr N had recently completed a course of 12 sessions of cognitive behavioural therapy. There is no reference as to whether Mr N would benefit from further therapy.
 - b. The issues related to Mr N's dismissal from work, the prospect of prolonged legal proceedings to seek compensation for the loss of his job and the uncertainty regarding the future of his professional career remain the main perpetuating factors for his depressive illness. It is known that factors such as these can be both precipitating and perpetuating for depressive illness. He therefore agreed with Dr Valmana that as a result of the work related stress Mr N's prognosis in the short term would have been poor.

- c. Dr Valmana's prognosis for the medium to long term is guarded depending on the outcome of legal proceedings. Dr Valmana also states that if Mr N's employers are not able to resolve the employment issues to Mr N's satisfaction, then the recovery from the depressive disorder would be severely compromised. It is acknowledged that legal proceedings can delay recovery, however with appropriate treatment and support a recovery is also considered to be likely.
 - d. Whilst the stresses related to Mr N's work situation and the prospect of legal proceedings may have an impact upon his depressive illness, and extend the length of time to recovery, the expectation would, on the balance of probabilities, be that he would make a recovery such that he could return to work as a senior first officer with BA within a period of one to two years from 30 October 2010.
 - e. Mr N's letter and email in July 2010 to Mr Y and Dr Wilkinson, respectively, indicated that he had an overall goal of returning to flying duties with BA.
 - f. In his opinion, the medical evidence does not support the view that Mr N is unlikely to recover for the foreseeable future and that he would be prevented from carrying out his normal duties even after reasonable adjustments.
6. In August 2014, the Trustees met to reconsider Mr N for an ill health pension under the Scheme. Following that meeting, the Trustees wrote to Dr Weddell asked for his advice. Dr Weddell replied on 2 September 2014 saying:

"Firstly, you have asked me to confirm whether it is my opinion that:

It would have been reasonable for [Mr N] to persevere with at least one of the drug treatments offered to him despite the side effects;

It would have been reasonable for him to try other antidepressant drugs, even though it is reported that he suffered side effects from the two that he had tried;

There were other antidepressant treatments readily available in 2010...

It is well recognised that individuals who are prescribed antidepressant drug treatment can suffer with side effects upon commencing treatment. These are usually mild in nature and, depending on the class of antidepressant drug treatment, include headache, nausea...The side effects are usually transient in nature lasting for up to one to two weeks. Fewer individuals can suffer with more significant side effects. It is not recorded in the medical records the nature of [Mr N's] side effects from antidepressant drug treatment and, therefore, it is not possible for me to provide you with an opinion as to whether he should have persevered with at least one of the drug treatments offered to him, despite the side effects.

It is however, my opinion that it would have been reasonable for him to try other antidepressant drug treatments, and these would have been readily available to him in 2010...

Secondly you have stated that on page six of my report, you note that I have stated that commercial pilots can now fly whilst taking antidepressant drug treatment. The Trustees did not consider this a relevant factor during their decision making as it is understood that this guidance did not apply until September 2012 and as the assessment was intended to be considered without hindsight (ie the assessment was to be conducted at the date of the application to the Company dated 30 September 2010,) the Trustees have asked to confirm that this did not affect my advice. I can confirm that this is the case."

7. On 5 September 2014, the Trustees wrote to Mr N informing him that they had obtained and considered the medical evidence and had determined that he was not entitled to an ill health pension under the Rules as at 30 September 2010. They said that they had received a report from Dr Weddell in which he says that he is of the opinion that on 30 September 2010, Mr N did not satisfy the definition of medical incapacity under Rule 14(e). They enclosed a copy of Dr Weddell's report.
8. Mr N complained to the Trustees about their decision not to grant him an ill health pension as at 30 September 2010, and the matter was dealt with under stages one and two of the Scheme's internal dispute resolution procedures (**IDRP**). His complaint was not upheld under IDRP.
9. Mr N consequently brought his complaint to us.

Summary of Mr N's position

10. He believes that the Trustees have used hindsight when deciding he did not meet the criteria for an ill health pension contrary to the Determination. Although the Trustees say that Dr Weddell had based his report on the evidence as at 30 September 2010, they also state that they saw reports after that date. Dr Weddell was aware that he was not prescribed any other drugs. By altering this fact, in his opinion, Dr Weddell was using hindsight. The medical evidence at that time clearly cast doubt on his recovery in the foreseeable future.
11. The Trustees' decision of 5 September 2014 and Dr Weddell's report do not address the problems identified with the medical evidence in the Determination.
12. The evidence that he submitted during his initial application up to the final rejection by the Trustees of his appeal (on 3 August 2011) should be included in assessing his eligibility for an ill health pension. He thinks that this evidence, given at the time using foresight, should be used again as without it he would have no way to challenge the Trustees and Dr Weddell.

13. There is a fundamental error in the approach taken by Dr Weddell in that he conducted a new diagnosis/prognosis of his health rather than conduct a review of the decision taken by British Airways Health Service (**BAHS**), and hence BA and the Trustees, based on the reports available at the time.
14. He could not see how Dr Weddell could have made an assessment of his health at the time of his application (in September 2010) given that: Dr Weddell never met him; Dr Weddell was making a new diagnosis about something that happened over four years ago; and Dr Weddell's opinion in 2014 given more credence than that of his own consultant with whom he met on several occasions and who clearly said that he would not recover in the foreseeable future.
15. None of Dr Weddell's recommendations was suggested by the doctors he saw during the period leading to his application in 2010.
16. Dr Weddell states that it cannot be concluded that he received appropriate anti-depressant drug treatment for the management of his illness but then goes on to state that, with the appropriate treatment and support, a recovery is also considered to be likely. He does not think that the position can be corrected four years later by suggesting that he could take drugs.
17. His recovery was not dependent on any drugs he took, but upon him being satisfied that his employment issues had been resolved. Nobody has said otherwise. The precipitating and perpetuating factor would need to be resolved to his satisfaction for him to start to recover. The employment issues are central to his depression and it is irrational to minimise their importance.
18. Dr Weddell does not explain why it is expected he could recover despite the legal proceedings and unresolved work issues.
19. Dr Weddell states that it cannot be ascertained from the medical record the nature of his side effects from the anti-depressant drug treatment and, therefore, cannot provide an opinion as to whether he should have persevered.
20. He gave his permission for his medical records to be released but has not been advised which documents were shared with Dr Weddell. However, Dr Weddell in his assessment refers to a non-medical letter dated 16 July 2010. He does not consider this is part of his medical record.
21. During the Employment Tribunal he was directed to have a medical assessment which concluded that he was suffering from moderate depression. The date of the Employment Tribunal was significant and he feels that this has been completely ignored.
22. He has concerns regarding Dr Weddell's impartiality.
23. The trustees state that Dr Weddell's report was based on evidence as of 30 September 2010, but also state that he saw reports after that date (para 2.6 of their

submissions). Therefore he did use hindsight and Dr Valmana's report of 26 January 2011 should also have been considered.

24. All evidence that he submitted in connection with the original application up to the final rejection of his appeal on 3 August 2011 should be considered.
25. His recovery was not dependent on drugs taken but upon a satisfactory, to him, outcome to his employment issues. Nobody has said otherwise. The precipitating and perpetuating factors related to his employment issues are central to his depression and it is irrational to minimise their importance.
26. A medical of 12 February 2012 demonstrates that Dr Weddell's prediction about rate of recovery was wrong.
27. Dr Weddell never wrote to him and the request for disclosure of medical records came via BAHS.

Summary of the Trustees' position

28. They do not consider that the Determination had directed them to respond to problems identified with the medical evidence. In reconsidering Mr N's case, they have not based their decision on BAHS's conclusions but instead have taken the medical advice required from Dr Weddell.
29. However, in considering how to approach Mr N's claim they did consider in detail the points made by the Determination. To the extent that the issues identified in the Determination are of wider application, they have taken great care to ensure that they have been addressed in the most recent medical opinion by Dr Weddell.
30. In order to comply with the Determination that they make their own decision, it was necessary for them to conduct their own assessment as to whether Mr N met the definition of "Medical Incapacity". The Determination expressly required them to make their decision based on "such medical evidence and advice as they may require". They are not medical experts so they needed to obtain medical advice to address these issues. They gave careful thought to what medical evidence and advice was needed in order to make their decision and concluded they needed the assistance of an independent medical adviser - Dr Weddell. This is, in their opinion within the scope of the Determination.
31. There seems to be a fundamental difference of opinion between Mr N and them as to what is meant by the phrase "without hindsight" in the Determination. Their understanding is that they were clearly free to obtain a new medical opinion, but that the opinion must be based on the evidence as at 30 September 2010 and must not consider what happened to Mr N between then and now.
32. Accordingly, they gave Dr Weddell clear instructions to consider only the medical evidence available as at 30 September 2010. Dr Weddell acknowledged that the

case must be considered without hindsight, based on the position as at the date of Mr N's application knowing what was known then.

33. (At paragraph 2.6 of their submissions) They provided Dr Weddell with all BAHS and Duradiamond reports, together with reports from Mr N's GP and specialist. It is clear from Dr Weddell's report that these have been considered carefully and that he followed the instructions in the Determination not to use hindsight.
34. There was no direction in the Determination that their medical adviser should meet with Mr N. In fact, it would be more of a risk of hindsight if Dr Weddell were to have met with Mr N at the time of making his report as it would have been difficult to ignore Mr N's then current health (whether better, worse or the same).
35. In reaching his opinion on the likelihood of recovery in the foreseeable future, Dr Weddell took into account a range of medical evidence from the time of Mr N's application, including that from Dr Wilkinson (occupational health medical adviser), Dr Rose (Mr N's GP) and Dr Valmana (Mr N's consultant psychiatrist). Reports from these medical advisers are cited throughout Dr Weddell's own report. Dr Weddell has, in accordance with the Determination, assessed whether on the date of his application Mr N met the definition of "Medical Incapacity".
36. They considered it relevant to their decision to examine whether other treatments were available to treat Mr N's condition at the time of his application (whether or not these had, in fact, been recommended to Mr N as at 30 September 2010). Dr Weddell advised them that it would have been reasonable for Mr N to try various medical treatments which were readily available in 2010. They disagree that these recommendations involve hindsight. They represented a rational opinion as to whether or not Mr N was likely to recover in the foreseeable future on the basis of medical treatments widely available at the time.
37. Mr N had asked that they take into account of the issues identified in the Determination in relation to BAHS's assessment, one of which was that BAHS did not specify treatments available to Mr N. Dr Weddell's explanation of treatment options demonstrates that they have sought to address this matter.
38. The availability of alternative medical treatment was one factor to which they gave weight, but it was not the only factor in reaching their conclusion. For example, they were advised in Dr Weddell's report in September 2014 that it would have been reasonable for Mr N to persevere with at least one of the existing drug treatments offered to him despite the side effects.
39. Dr Weddell's report states that as at 30 September 2010, he did not consider that Mr N had received appropriate treatment but that he expected, on the balance of probabilities, Mr N would have recovered with appropriate treatment and support.
40. The actual duration and outcome of the legal proceedings in relation to Mr N's employment issues is not relevant to Dr Weddell's assessment, as Dr Weddell is

required to examine the situation without hindsight as at 30 September 2010. Dr Weddell noted that approximately 80% of the individuals recover within six to 12 months after a first episode of depression with adherence to evidence-based treatment. Dr Weddell considered that with appropriate treatment and support he would consider a recovery "likely".

41. Dr Weddell does make general statements about the typical side effects of antidepressant drug treatment such as that administered to Mr N. He observed that, based on the lack of information provided as to the nature of the side effects suffered by Mr N, it is not possible for him to provide an opinion as to whether Mr N should have persevered in taking medication he was prescribed. However, Dr Weddell's opinion was that it would have been reasonable for Mr N to try other antidepressant drug treatments that were readily available in 2010.

Conclusions

42. Mr N's complaint is two-fold: (a) the Trustees failed to follow the directions in the Determination; and (b) the Trustees were wrong to refuse to award him an ill health pension.
43. Dealing with the first part of Mr N's complaint, according to the Determination, the Trustees had to consider Mr N's eligibility for an ill health pension as at 30 September 2010 without hindsight. This means that the Trustees had to decide the matter based on the medical evidence of his condition and likely prognosis as at that date. The Determination explicitly left it open to the Trustees to decide what medical evidence and advice they required to do that.
44. The Trustees sought Dr Weddell's advice to help them in their decision. They instructed him in the terms of the Ombudsman's direction and disclosed Mr N's occupational health file to him. According to his report, Dr Weddell considered documents relevant to the period 12 Feb 2006 and 30 Sep 2010 (ie the date of application). Among these, Dr Weddell considered reports in June and September 2010 from Dr Valmana. He did not consider Dr Valmana's report of 26 January 2011. He did not, so far as I can see from his report, consider any medical evidence outside the timeframe above. If the Trustees are right when they submit that Dr Weddell was given all the BAHS and Duradiamond reports, there is no evidence that Dr Weddell relied upon these assessments in reaching his conclusions. Dr Weddell is specific about which items of evidence he refers to and they are all pre-September 2010. He was entitled to decide how to approach his task of conducting a review without hindsight. He has chosen a cut-off date for the evidence to be considered and applied it consistently. I cannot see any bias or want of rationality in his approach.
45. Dr Weddell concluded that the medical evidence which he reviewed, which included two opinions from Mr Valmana, did not support the view that Mr N was unlikely to recover for the foreseeable future and was prevented from carrying out his normal

duties even after reasonable adjustments; consequently, he did not meet the criteria for an ill health pension.

46. I agree with the Trustees that Dr Weddell's opinion is advice they are entitled to obtain and nothing in the previous Determination should have prevented them from obtaining it.
47. The Trustees asked Dr Weddell whether Mr N should have persevered with at least one drug, despite the side effects; it would have been reasonable for him to try other antidepressant drugs; and were other antidepressant treatments available in 2010. I cannot see from Dr Weddell's response to these questions that he knew Mr N was not prescribed other drugs. Even if he did know, I do not consider that he was using hindsight as Mr N has claimed.
48. There was no requirement for the Trustees to address the problems identified under the Determination. The Trustees are required to reconsider Mr N for an ill health pension in accordance with the Rules. I can find nothing to suggest that the Trustees did not do so.
49. I cannot agree that the Trustees were required to consider all the evidence submitted by Mr N up to the stage his application was finally rejected by them on 3 August 2011. The Trustees were obliged to obtain sufficient evidence and advice to satisfy themselves whether the relevant test was met as at 30 September 2010. I am satisfied that they did so.
50. I also cannot agree that Dr Weddell had made a new diagnosis, made recommendations or should have conducted a review of the decision previously taken by BAHS. Dr Weddell gave his opinion, in response to questions from the Trustees, as to whether other treatments were available to Mr N at the time of the application. I do not consider that these questions were irrelevant or that by answering them Dr Weddell was making any recommendations or a new diagnosis. He was simply stating the reasoning behind his opinion about whether or not the test was satisfied. The Trustees needed to understand his rationale to satisfy themselves that it was sound.
51. I accept that Mr N's employment issues are central to his recovery and at the date of his application for an ill health pension these issues were ongoing. However, that does not mean that a decision as to whether he met the criteria for an ill health pension could not be made while these issues were ongoing. I do not think it is right to say that Dr Weddell and by extension the Trustees ignored this factor. The evidence is that it was considered. Dr Weddell, in his August 2014 report, acknowledged that the legal proceedings associated with employment issues can delay recovery but concluded that with appropriate treatment and support a recovery was considered to be likely. Dr Weddell also said that, on the balance of probability, Mr N would make a recovery and return to work within a period of one to two years from 30 October 2010.

52. For the reasons given above, I am unable to find that the Trustees failed to correctly follow the Determination. Therefore, I do not uphold this part of the complaint.
53. I now turn to Mr N's complaint that the Trustees refused to award him an ill health pension. The power to award an ill health pension lies solely with BA. The Trustees do not have a discretion as to whether or not an ill health pension is payable under Rule 14. The Trustees do have a duty, however, to ensure that the Rules are correctly applied and this is provided in Clause 7. This includes determining whether the Medical Incapacity test was properly applied.
54. My role with regard to this part of Mr N's complaint is not to decide whether or not he is entitled to an ill health pension – that is for the BA to decide. Also, it is not for me to agree or disagree with the medical opinion. My role is to decide whether the Trustees have correctly applied the Rules and in doing so asked the right questions; considered all relevant information; and made a proper decision.
55. In deciding whether the Medical Incapacity test has been properly applied, the question the Trustees needed to ask themselves was whether Mr N met the criteria as set out under the Rules (ie was he unlikely to recover for the foreseeable future and was he prevented from carrying out his normal duties even after reasonable adjustments) as at the date of his application? In his advice to the Trustees, it is clear that Dr Weddell was aware of the criteria when he gave his opinion.
56. The Trustees considered Dr Weddell's approach to the assessment in considerable detail. They took care to consider only the issues which were known about and relevant at the date of application, and made further enquiries with Dr Weddell, which I consider were relevant to the matters they were considering.
57. The Trustees based their decision on Dr Weddell's opinion after a process of testing its rationality and exercising their own judgment about its contents. Therefore, I cannot see that they reached an improper decision.
58. Consequently, I am unable to find that the Trustees misapplied the Rules, asked themselves the wrong questions, considered irrelevant matters or reached an improper decision. I therefore do not uphold this part of Mr N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
30 November 2016