

Ombudsman's Determination

Applicant	Mrs K
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS BSA (NHS BSA)

Outcome

1. I do not uphold Mrs K's complaint and no further action is required by NHS Pensions
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs K's complaint against NHS BSA concerns its decision not to award her an ill health retirement pension (**IHRP**).

Background information, including submissions from the parties

4. Regulation E2A of the NHS Pension Scheme Regulations 1995 defines the Tier 1 condition as "permanently incapable of efficiently discharging the duties of that employment" (that is the member's NHS employment) and the Tier 2 condition as "permanently incapable of regular employment of like duration...in addition to meeting the Tier 1 condition". "Permanently" means incapable of employment to age 60.
5. Mrs K was a member of the Special Classes (**SC**) and applied for pension benefits at the age of 56, which were subsequently paid to her from April 2012 on an unreduced basis.
6. In May 2016, Mrs K applied for a retrospective IHRP on the grounds that her employer had informed her that as a member of SC there would be no benefit to her applying for an ill health pension.
7. In June 2016, Mrs K raised a complaint by invoking the Scheme's two-stage internal dispute resolution procedure (**IDRP**), on the basis that her employer had not given her the correct information with regard to her application for an IHRP.

8. On 20 July 2016, NHS BSA sent Mrs K a letter that said:

“...I have been making enquiries with your former NHS employer...to enable me to fully consider your dispute...I now intend to refer your case to our Medical Advisers at OH Assist asking them to consider your case and advise if an Ill Health Retirement...application would have been successful under Tier 1 or Tier 2 conditions if an application had been made around 11 April 2012 when your employment was terminated, as entitlement to IHR Retirement benefits can only be considered at a point in time.”

9. In her application, Mrs K, among other reports, submitted the following medical reports from her treating doctors:

- Report from Dr Madan, Locum Consultant Rheumatologist dated 14 June 2011 that said, “Mrs K does not fulfil the tender point criteria for fibromyalgia. To investigate her myalgias further I have requested for a CK, vitamin D and an ANA and we will see her with the results of the investigations.”
- Report from Dr Madan, dated 6 July 2011 that said, “...Diagnosis...Myalgias...I would suggest optimising her analgesia as per my previous clinic letter. We will see her for one further appointment to discuss the results and discharge.”
- Report from Mrs Jackson, Directorate Clinical Manager dated 7 November 2011 that said, “Mrs K...is classified as special classes and as such will not benefit from Tier 1 retirement as she is already 56...unless she should have a definitive diagnosis at a later date that could allow her to reapply for Tier 2 retrospectively...”
- Report from Dr Kirby, GP with a special interest in Rheumatology, dated 28 November 2011 that said, “Taking the symptom[s] in the whole the combination of muscle weakness, pain, fatigue, sleep disturbance, low mood and the 8 of 18 tender trigger points, I think the diagnosis here is that of fibromyalgia...I have provided her with a leaflet on Fibromyalgia and informed the patient I will be willing to confirm this diagnosis to the NHS Pensions Board.”

10. On 6 September 2016, NHS BSA sent Mrs K a letter that said:

“Regrettably, I am not yet able to send you a full reply because your case has now been returned to our Medical Advisers [MA] for consideration and advice with regard to possible retrospective entitlement to Ill Health Retirement benefits. We hope to be able to send you a full response by 1 November 2016.”

11. On 27 September 2016, NHS BSA sent Mrs K an acknowledgement letter that said:

“I am writing in response to your letter of dispute that was received at NHS Pensions... I will be considering your dispute and offering you a response under Stage One of NHS Pensions’ Internal Dispute Resolution (IDR) procedures.”

12. The same day, NHS BSA sent Mrs K a response under Stage one of the IDRPs that said:

"I have to inform you that the Scheme's administrators are unable to accept that you would have been deemed to have been permanently incapable of carrying out your duties as a Ward Sister when you retired...Relevant medical evidence has been considered in this case...During 2011, this lady was being investigated for symptoms of generalised joint pains with swelling, fatigue...In late 2011, a diagnosis was made of Fibromyalgia. She had been receiving treatment with pain medication, and was referred for further help to a Fibromyalgia Group...There is no indication that she had received treatment with Graded Exercise Therapy or Cognitive Behavioural Therapy prior to the date of termination of employment...At a later date, she suffered additional health problems...on the balance of probabilities: Neither the NHS Pension Scheme Tier 1 nor Tier 2 condition is met."

13. In October 2016, Mrs K appealed against NHS BSA's decision by invoking Stage two of the IDRPs. She submitted that she had claimed retrospective IHRP because of fibromyalgia, and subsequently developed adrenalin deficiency, cervical stenosis, and peripheral neuropathy of the hands and feet. Mrs K contended that she had been suffering with all of her conditions prior to her retirement and not at a later date as per the MA's recommendation.
14. On 15 November 2016, NHS BSA sent Mrs K a response under Stage two of the IDRPs that said:

"[Mrs K] believes that her symptoms at the time of the termination of her employment were due to adrenal insufficiency and had been mis-diagnosed as fibromyalgia. However, Dr Kotu is of the opinion that "the adrenal insufficiency was likely due to opiate treatment for the symptomatic control of pain due to a diagnosis of fibromyalgia since 2011...It is acknowledged that [Mrs K] has developed significant health problems over the past few years. However, when she left her employment in April 2012 (which is the period under consideration) the cause for her symptoms and incapacity for work was fibromyalgia...As there are therapeutic options still available and scope for improvement in her condition sufficient to return to her NHS role, then it would not have been possible to conclude that she was permanently incapable of her NHS [sic] at this time."

15. In July 2017, Mrs K referred her complaint to this Office.
16. On 9 May 2018, NHS BSA sent this Office a formal response that maintained its previous stance and added that:

"NHS Pensions submits that it has properly considered [Mrs K]'s application taking into account and weighing all relevant evidence and nothing irrelevant...In considering [Mrs K]'s application for [IHRP] the medical

adviser's recommendations and rationales are founded on the correct interpretation of the appropriate Scheme regulations, take into account relevant medical evidence...However, the fact that [Mrs K] does not agree with the conclusion drawn and the weight attached to various pieces of evidence does not mean that any conclusion is necessarily flawed."

Adjudicator's Opinion

17. Mrs K'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 briefly below: -
- NHS BSA needed to consider Mrs K's IHRP application in line with the Scheme's Regulations and properly explain why her application either can or cannot be approved.
 - Mrs K has received an unreduced pension since her employment terminated in April 2012 which is what she would have received had she been awarded a Tier 1 IHRP. Therefore, consideration only needs to be given to eligibility for a Tier 2 condition. Under Regulation E2A, to meet the Tier 2 condition, a member must be "permanently incapable of regular employment of like duration...in addition to meeting the Tier 1 condition" until age 60.
 - The Scheme's Medical Adviser considered all Mrs K's relevant medical evidence that was available in 2011, prior to the termination of her employment. Based on the evidence, the Scheme's Medical Adviser concluded that, with the right treatment, she would have been able to go back to her post of a Ward Sister before age 60. Therefore, it was the MA's view that Mrs K did not qualify for an IHRP.
 - I am satisfied that NHS BSA complied with the Scheme's Regulations and that all relevant evidence has been considered. It is for NHS BSA in consultation with its Medical Adviser to attach weight (if any) to the evidence it is presented.
 - Mrs K contends that she had suffered from all her conditions before her employment was terminated. However, I have seen no evidence of this. As the medical reports refer to the symptoms of fibromyalgia which she was eventually diagnosed with in late 2011. It is accepted that her other health conditions started after she left her NHS employment which could not have been considered by NHS BSA under her application. This is because the MAs and NHS BSA can only consider evidence relevant to the date of Mrs K's termination of employment, which was April 2012.
 - As the correct processes have been followed and all the medical evidence presented considered, the Adjudicator did not think that a flawed decision has been reached.

18. Mrs K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs K provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs K for completeness.
19. Mrs K referred to her current health condition having deteriorated. She also said that her condition, at the time, would have prevented her performing her role permanently as she would have not been able to hold or lift patients.

Ombudsman's decision

20. My role in this matter is not to decide whether Mrs K is entitled to an IHRP - that is for NHS BSA to decide in consultation with its MA. Also, it is not for me to agree or disagree with any medical opinion.
21. My role is to decide whether NHS BSA has correctly applied the Scheme's Regulations, considered all the relevant evidence and made a decision which is not flawed. By flawed, I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.
22. I can see no evidence that NHS BSA has not followed the correct processes and has not considered the IHRP in line with the Regulations.
23. NHS BSA is required to consider the prognosis of an applicant for an IHRP as at the date of application. That requires a forward-looking assessment on the balance of probabilities based on the evidence then available. The fact that some years later it may appear that somebody has a different outcome to that which was expected is not itself proof that the original application was wrongly decided.
24. I find that NHS BSA considered all Mrs K's relevant medical evidence and abided by the Scheme's Regulations and find no reason to remit her case back to NHS BSA for re-consideration.
25. Therefore, I do not uphold Mrs K's complaint.

Karen Johnston

Deputy Pensions Ombudsman
20 November 2018