PO-16324

Ombudsman's Determination

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

Outcome

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

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N's complaint concerns NHS BSA's decision to refuse his application for an ill health retirement pension (**IHRP**).

Background information, including submissions from the parties

4. Regulation E2A (of 'The NHS Pension Scheme Regulation 1995') sets out the conditions for the payment of an IHRP. It prescribes that to be awarded Tier 1 the member must be, "permanently incapable of efficiently discharging the duties of that employment" (that is the member's NHS employment). To be awarded Tier 2, the member must be, "permanently incapable of regular employment of like duration…in addition to meeting the Tier 1 condition". "Permanently" means to age 60.

5. Mr N worked as a Clinical Support Officer for NHS. He commenced sickness absence from work in May 2014.

6. On 18 October 2014, Mr N applied for an IHRP and was referred to an occupational health (**OH**) for assessment. OH records show that Mr N had cumulative perceived work related stress mainly relating to a significant breakdown in the relationship with his manager and other stressful work-related events. Dr Charles of OH said that "it seems premature to state that symptoms which onset less than six months ago, with less than five months of treatment, can be deemed permanently incapable of recovering from his depression and anxiety and resuming his role."

7. On 21 November 2014, NHS BSA sent Mr N a decision letter saying that after assessing his case, the Scheme's Medical Adviser (**MA**) has advised that:

> "The natural history of a first episode of depression is resolution within a year or so. Negative perceptions, lack of resilience, anxiety and panic are commonly associated with depression. These are likely to improve as his depression improves with treatment. Although he is currently unfit for his role, he is more likely than not to recover capacity for that role and for address of any perceived work issues, over time and with compliance with above treatment. It is considered that the evidence does not indicate this member is on the balance of probabilities, permanently incapable of the duties of the NHS employment."

8. Mr N appealed against NHS BSA's decision by invoking the two-stage internal dispute resolution procedure (**IDRP**). In his appeal, Mr N provided a report from his psychiatrist, Dr Corsico, dated 5 June 2015 that said that the assessment confirmed a moderate to severe anxiety disorder, which had not responded to anti-depressant therapy prescribed or to eight sessions of cognitive therapy. Mr N also provided a report from his GP, Dr Barfield, who confirmed that Mr N is unable to return to his work with NHS and it is unlikely that he will ever be able to return to work in any role.

9. In June 2015, Mr N's employment was terminated by NHS BSA on the grounds of ill health.

10. On 21 November 2015, NHS BSA sent Mr N a response under stage one of the IDRP apologising for the delay in sending the letter. The letter said that:

> "The letter from his GP supports his application for ill health benefits, but this is dated April 2015 and does not indicate a likelihood of permanent incapacity for work. It does not reflect the subsequent lack of engagement with treatment services…In my opinion, the description of his symptoms is consistent with an Adjustment Disorder. The evidence is that this type of condition, although often severe at onset, tends to resolve over a period of time and few individuals (around 17%) would be expected to have significant symptoms five years later…Having carefully considered the comments of the Medical Adviser, I can see no reason to disagree with their conclusion and I, therefore, endorse the view that you are not entitled to Ill-Health Retirement Benefits from the NHS Pension Scheme."

11. On 17 January 2016, following Mr N's appeal, NHS BSA sent a response under stage two of the IDRP that maintained its previous stance and added that:

> "…it is medically accepted that engagement with full and appropriate specialist treatment intervention with both medication therapy and lengthy talking therapy…would, on the balance of probabilities, be expected to improve the conditions of Anxiety and Depression, sufficient to enable a return to employment prior to Normal Benefit Age…"

12. In May 2017, Mr N brought the complaint to this Office.

13. On 12 January 2018, NHS BSA sent this Office a formal response letter that said:

> "NHS Pensions submits that it has properly considered Mr N's application, taking into account and weighing all relevant evidence and nothing irrelevant. It has taken advice from the proper sources i.e. the Scheme's medical advisers, considered and accepted that advice…a range of opinions may be given from various sources, all of which must be considered and weighed. However, the fact that Mr N does not agree with the conclusions drawn and the weight attached to various pieces of evidence does not mean that any conclusion is necessarily flawed".

Adjudicator's Opinion

14. Mr 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 briefly below:-

- NHS BSA needed to consider Mr N's IHRP application in line with the Scheme's Regulations and properly explain why his application either can or cannot be approved.
- The Adjudicator was 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 MA to attach weight (if any) to that evidence.
- Essentially, under Regulation E2A, in order to be eligible for a Tier 2 IHRP, 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 MA considered all Mr N's relevant medical evidence and concluded that with the right treatment, he will be able to go back to his NHS employment and therefore does not meet the criteria for either Tier 1 or Tier 2.
- A difference of medical opinion between the MA and Mr N's treating doctors as to his permanent incapacity for work of like duration to her former NHS duties is not sufficient for the Ombudsman to say that NHS BSA's decision to accept the opinion of the MA (who are experts in occupational health) was perverse.
- The Adjudicator appreciated that NHS BSA's decision may not be satisfactory to Mr N. However, the Scheme's MA and subsequently NHS BSA had considered Mr N's entitlement to an IHRP as at the date of his application therefore the Adjudicator did not uphold Mr N's complaint.

15. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his 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 Mr N for completeness.

16. Mr N agrees with Dr Charles that, at the time of his application, it seemed premature to say that his symptoms deemed permanent. He is unhappy that none of his evidence post June 2015 has been considered by the Adjudicator.

17. Mr N contends that his psychiatrist and GP's reports have not been considered by NHS BSA and that MA's conclusions were not up to date. He believes he has had full appropriate treatment. He says he had further CBT after June 2015 and remains on Venlaflaxine. He draws attention to his current health condition four years later and says he has been and will continue to be unable to work at all. He contends that the evidence now available shows that he falls within the 17% of people who would be expected to have significant symptoms five years later.

Ombudsman's decision

18. My role in this matter is not to decide whether Mr N 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.

19. My role is to decide whether NHS BSA has correctly applied the Scheme's Regulations, considered all the relevant evidence and make a decision which is not perverse. By perverse, I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.

20. 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. I see no reason to remit the decision back to the NHS BSA.

21. Mr N refers to his current health condition and says he has been unable to work and will never be able to work before the age 65. NHS BSA is required to consider the prognosis of an applicant for IHR 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.

22. That said, it is necessary to look at updated medical evidence which emerges only after the initial decision has been made, to the extent that it talks about prognosis as at date of application, and is made available before the end of any relevant appeal process. I have therefore considered whether the IDRP decision maker ruled out any medical evidence which was presented to it. From the records of the two stage IDRP process there appears to have been a complete consideration of all the evidence which was available at the time of each IDRP decision. There is no indication that reports provided were dismissed as irrelevant.

23. However, Mr N is entitled to make a fresh application as a deferred member of the Scheme any time before age 60, submitting any new supporting evidence with his application.

24. I find that NHS BSA considered all Mr N's relevant medical evidence and abided by the Scheme's Regulations and found no reason to remit his case back to NHS BSA for re-consideration.

25. Therefore, I do not uphold Mr N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
20 March 2018