PO-16842

Ombudsman's Determination

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

Outcome

1. I do not uphold Mr H'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 H's complaint is that his application for the early release of his pension credit benefit on grounds of ill health has been incorrectly refused.

Background information, including submissions from the parties

4. Mr H is a pension credit member of the Scheme. He has never worked in the NHS. He worked in the print industry and had his own business. He gave up the business in 2012 following mental health issues which began in 2011. His mental state was subsequently stabilised for a number of years, but his mental health issues re-emerged following the breakdown of his second marriage in 2015. Mr H has additionally had a diagnosis of Non-Hodgkin's Lymphoma (in remission), Ischaemic Heart Disease and Gastric issues.

5. In March 2016 Mr H applied for the early payment of his pension credit benefit on grounds of ill health. He was then age 50.

6. The NHS Pension Scheme Regulations 1995 (as amended) (**the 1995 Regulations**), apply. As relevant Schedule 2A says:

> "3B Pension credit benefit before attaining normal benefit age (on grounds of ill health)
>
> (1) A pension credit member shall be entitled to the payment of the pension credit benefit described in paragraph 3 of this Schedule before attaining normal benefit age if the Secretary of State is satisfied that the pension credit member-

> (a) meets the ill-health condition specified in paragraph 1 of Schedule 28 to the 2004 Act [the Finance Act 2004], and
>
> (b) had previously been engaged in regular employment but is now permanently incapable of engaging in regular employment due to mental or physical infirmity.
>
> (2) For the purpose of sub-paragraph (1), the Secretary of State may require whatever medical evidence that the Secretary of State considers necessary."

'Permanently' means until the Scheme's normal retirement age of 60. 'Regular employment' is not defined in the Regulations. Therefore its ordinary and everyday meaning applies: any full-time or part-time employment of a continuing nature.

7. Paragraph 1 of Schedule 28 of the Finance Act 2004 says:

> "For the purposes of this Part the ill-health condition is met if:
>
> (a) the scheme administrator has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on the member's occupation because of physical or mental impairment, and
>
> (b) the member has in fact ceased to carry on the member's occupation."

8. Part 2 of the submitted application was completed by Dr Craigie (Mr H's then GP). Dr Craigie said Mr H had only registered as a patient in January 2016 consequently his present functional restrictions and disability were not known. Taken from a summary from Mr H's previous GP, Dr Craigie noted under diagnosis: chronic depression, ischaemic heart disease, chronic gastritis and lymphoma (in remission). Under prognosis Dr Craigie said that Mr H appeared to suffer from a number of chronic conditions which were unlikely to improve. Dr Craigie said Mr H remained under the care of a haematologist and had not seen the mental health team since 2013.

9. OH Assist, NHS BSA's Medical Adviser, requested further information from Dr Craigie. Dr Craigie replied on 16 April 2016, enclosing a letter dated 5 April 2016 from the Community Mental Health Team.

10. OH Assist, acting on behalf of NHS BSA, turned down Mr H's application on the grounds that the current medical evidence did not suggest that Mr H was likely to remain unfit for regular employment (full-time or part-time employment) until age 60.

11. Mr H invoked the Scheme's two-stage internal dispute resolution (**IDR**) procedure.

12. At IDR stage 1 Mr H submitted letters from his previous GP, Dr White, dated 1 July 2013 and 8 January 2015, and a declaration of ill health form completed for Aviva by Dr White on 19 October 2015. The latter was in respect of a with profits policy that Mr H held with Aviva. The signed declaration said that Mr H was and would continue to be incapable carrying out his occupation of Print Consultant and had in fact ceased to carry out his occupation.

13. NHS BSA obtained the opinion of another medical adviser (not previously involved). After reviewing Mr H's stage 1 submission along with the existing medical evidence the medical adviser concluded that although Mr H was likely incapable of regular employment at the moment he was likely to be clinically capable of regular employment before age 60.

14. NHS BSA duly turned down Mr H's appeal at IDR stage 1.

15. At IDR stage 2 Mr H submitted, via the Pensions Advisory Service (TPAS), NHS Pensions form AW240. Part 2 of the form was completed by Dr Salim, Mr H's then current GP.

16. NHS BSA turned down Mr H's final appeal after obtaining the opinion of another medical adviser that Mr H was not permanently incapable of regular employment.

17. A summary of the medical evidence is provided in the appendix.

Adjudicator's Opinion

18. Mr H'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:-

    - It is accepted that Mr H cannot currently work. The dispute is whether Mr H is likely to be capable of regular employment before age 60.

    - Whilst Mr H qualified for the early release of his policy benefits with Aviva, the criteria for the early release of his pension credit benefit in the Scheme is more stringent. But even if the test was the same NHS BSA is not bound by Aviva's decision. Similarly Mr H's placement in a support group for ESA does not mean that he satisfies the criteria under the 1995 Regulations.

    - To qualify under the 1995 Regulations Mr H must pass a two part test on the balance of probabilities. Firstly, he must be permanently incapable of carrying out his occupation, and secondly, he must be deemed permanently incapable of engaging in regular employment. Consequently if Mr H is deemed capable of any regular work before age 60 he fails the test.

    - NHS BSA complied with the Scheme's Regulations and all relevant evidence was considered. It is for NHS BSA in consultation with OH Assist to attach weight (if any) to that evidence.

    - At IDR stage 1 the OH Assist doctor listed what he considered "reasonable treatment" and gave his opinion that if Mr H complied with it, more likely than not, he would be capable of regular employment before age 60. The medical adviser noted that Mr H had not been diagnosed with any condition that was likely to prevent Mr H's compliance and in the past had complied once the need for

treatment was explained to him. That position was maintained by another OH Assist doctor at IDR stage 2.

- There does not appear to be a difference of opinion between the OH Assist doctors and the doctors treating Mr H. But even if that was not the case a difference of medical opinion it is not sufficient for the Ombudsman to say that NHS BSA decision was not properly taken.

- Dr White did not say in her July 2013 letter to Mr H, or open letter of January 2015, that Mr H was permanently incapable of any regular employment, and the Aviva declaration she signed only went as far as saying that Mr H satisfied the criteria under the Finance Act 2004 for ill health retirement.

- Similarly, in December 2016, Dr Salim only said given Mr H's medical conditions were likely to affect his ability to work in the long term the option of early retirement would not be unreasonable.

- Mr H may submit a new application for the early release of his pension credit benefit if he is of the opinion that his health has worsened since December 2016.

19. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr H for completeness.

Ombudsman's decision

20. Mr H says he did not give up his business, but was forced out of business by the NHS. It is not clear why Mr H holds this view. Nevertheless nothing turns on it as it is not material to my consideration of his complaint as summarised above.

21. Mr H says he has an incurable cancer, chronic arthritis and heart disease. He says he has other issues which are being investigated, namely: prostrate, lower back and nerve and left sided groin and abdominal pain problems.

22. As the Adjudicator explained in his Opinion my role in this matter is not to review the medical evidence and come to a decision as to Mr H's eligibility for ill health retirement under the Scheme's Regulations, I am primarily concerned with the decision making process. Medical (and other) evidence is reviewed in order to determine whether it supported the decision made by NHS BSA. The issues considered include: 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 NHS BSA to decide (including giving some of it little or no weight). It is open to NHS BSA 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 NHS BSA to reconsider.

23. I agree with the Adjudicator that NHS BSA has abided by the Scheme Regulations and considered all the medical evidence. I am satisfied that NHS BSA's decision was properly made.

24. Mr H has referred to a number of conditions that are currently being looked at. If Mr H considers that his health has worsened since NHS BSA turned down his application he may submit a fresh claim to NHS BSA for ill health retirement.

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

Anthony Arter

Pensions Ombudsman
12 July 2017

Appendix

Summary of the medical evidence

Dr White, letter to Mr H dated 1 July 2013

26. "Your main problems at the moment are ongoing Stage 1A Hodgkin's disease for which you receive radiotherapy to date. Whilst you are currently in remission there is of course always a possibility that this could recur. You also suffer from ischaemic heart disease for which you take medication and acid reflux which causes continual abdominal and left sided chest pains.

    You have also been treated in the past for depression which given the chronic nature of your problems is not unreasonable or unexpected. The combination of these problems is likely to affect your ability to work in the long term and therefore pursing [sic] the option of early retirement would not be unreasonable."

Dr White, open letter dated 8 January 2015

27. Dr White summarised Mr H's current medical conditions as lymphocytic lymphoma, for which he was under the care of Dr Nagarajen at Warrington Hospital, ischaemic heart disease and chronic gastritis and reflux and chronic depression with some delusional element, for which he was under the care of the psychiatrists and community mental health team at Warrington. Dr White noted the medication Mr H was on and said there was currently a suspicion of recurrence of his lymphoma.

*Ms Marks, Duty Assessment Officer/ Senior Occupational Therapist, Community Mental Health Team, letter dated 5 April 2016 to Dr Hope at Mosslands Medical Practice (**MMP**).*

28. Ms Marks summarised a recent duty assessment:-

    - Since moving to Salford Mr H had lost contact with mental health services (and physical health services that were managing his lymphoma) and had not been taking any psychotropic medication for the last 4-5 months.
    - Mr H's mental health issues had begun in 2011 and he had been abusing alcohol and illicit drugs as a way of self-medicating around this time, but now he stated he no longer abused these substances. Since stopping psycotropic medication Mr H had noticed a definite deterioration in his mental health and was worried that things would continue to worsen until he was restarted on medication. He was also keen to re-engage with services to manage his physical health conditions.
    - Mr H denied any current thoughts or plans to harm himself and wanted to get things back on track, which he was making good efforts at doing. He denied any current thoughts of wanting to harm others. No other risk factors were identified at the time of the assessment.

29. Ms Marks said Dr Vadhani (Community Mental Health Team) wanted to review Mr H's current mental state, potentially restart him on psychotropic medication and decide whether he required ongoing monitoring by CMHT.

30. Ms Marks advised that she had contacted Mr H's previous medical consultants - Mr Brett (Gastroenerologist) and Dr Rahman (Haematologist managing Mr H's lymphoma). Dr Rahman's secretary required a letter from him (Dr Hope) requesting the transfer of Mr H's lymphoma care to a Salford consultant. Mr Brett's secretary had advised that Mr H had been discharged in 2012. However, as Mr H felt he had some polyps in his stomach the secretary had suggested that he (Dr Hope) start a new referral with a Salford based Gastroenterologist.

    Ms Marks said Mr H's main carer was his mother, who she had sent a Carer's information pack, she had provided Mr H with Salford crisis support contact numbers and he was aware that he could contact duty officers at the CMHT.

Dr Craigie (MMP), letter of 16 April 2016 to OH Assist

31. Dr Craigie said he was sorry that there was insufficient information in his previous report but said this was because Mr H had only recently registered with the practice and had only once been into the surgery.

32. Dr Craigie said Mr H's paper notes had yet to be received. He said as far as he could tell Mr H's physical and psychological symptoms overlapped. On possible lymphoma recurrence he said Mr H was suffering night sweats but otherwise there was no documentation of any further physical symptoms when he had been seen. He was under the Mental Health Team at Warrington but it did not appear he had had any psychotropic medication for at least 4-5 months. Symptoms documented were that he felt very unstable, was having visual hallucinations, sleep disturbance and night sweats.

33. Dr Craigie enclosed a copy of Ms Marks' 5 April 2016 report.

Atos medical adviser, original decision 9 May 2016

34. The medical adviser noted that Mr H's 2011 delusional disorder had stabilised for a number of years, but following the breakdown of his second marriage in 2015 he had moved and as a consequence had lost contact with the mental health services and had had no medication for over five months. He had mood swings, slept badly and had become paranoid. But had now been referred for a psychiatric assessment and it could reasonably be anticipated that his condition would stabilise once treatment recommenced.

35. The medical adviser noted that Mr H had been diagnosed with non-Hodgkin's Lymphoma in 2012 and had recently been referred to another Haematologist. He had a history of gastric polyps and it had been advised that he be referred to a Gastroenterologist. He had recently been placed in the support group for Employment

Support Allowance. It was noted that Dr Craigie had limited information about Mr H and did not have his full medical records.

36. The medical adviser concluded that Mr H was currently unfit for any work and was likely to remain so for the foreseeable future. But his condition was being actively investigated and treated with expectation of improvement in his symptoms and functional ability. The current available medical evidence did not suggest that Mr H was likely to remain permanently unfit for regular employment for the next ten years.

Atos medical adviser, IDR stage 1 decision 20 July 2016

37. The medical adviser considered Mr H's submissions together with the existing evidence. The evidence indicated that Mr H had significant mental health issues in 2011 which stabilised on treatment and CMHT input for some years. He had recent further personal stressors and had not been under the care of a haematologist or mental health services because of moving house and perhaps non-attendance.

38. The medical adviser said reasonable treatment would likely include: psychiatrist and CMHT management including medications if indicated, local haematologist and gastroenterologist involvement and involvement of a cardiologist for any incapacitating symptoms of ischaemic heart disease.

39. While it was likely that Mr H was currently incapable of regular employment, given his compliance with reasonable treatment it was likely that he would be clinically capable of regular employment within the next ten years to age 60. He had no diagnosed condition which would likely prevent his compliance as he had complied in the past once the treatment was explained to him.

Dr Salim, GP, 23 December 2016

40. As Mr H's attending GP, Dr Salim completed part 2 of NHS form AW240, which was submitted as part of Mr H's appeal of the IDR stage 1 decision.

41. Under information considered to be relevant to Mr H's long term incapacity for regular employment Dr Salim said:

> "[Mr H] suffers from multiple medical problems which can have a significant impact on his daily life. I understand that he has never worked for the NHS before. His medical conditions including ischaemic heart disease, oesophageal reflux and his mental health problems can affect his ability to return to work quite significantly.
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> [Mr H] has a past history of Hodgkin's lymphoma. Whilst he is currently in remission, there is always a possibility that this could [return]. Hence he will be under follow up of Haematologists. Given that his medical conditions are likely to affect his ability to work in the long turn, the option of early retirement would not be unreasonable."

Atos medical adviser, IDR stage 2 decision 10 February 2017

42. The medical adviser noted the criterion for the early release of a Pension Credit member's pension and the stage 2 submissions which had been considered along with the existing medical evidence.

43. Under 'Rationale' the medical adviser said:

> "This gentlemen suffers from a number of chronic health problems. He was diagnosed with a Stage 1 Lymphoma. He received radiotherapy treatment and the condition is in remission. He is under the regular review by a Haematology specialist.
>
> In 2011, he suffered a Delusional Disorder, on the background of a marital separation and abuse of alcohol and drugs. He came under the care of the Mental Health (MH) services and received treatment with antidepressant and anti-psychotic medication for chronic depressive illness. He has since abstained from further chemical abuse. Due to moving home, he lost contact with the MH services, and his medication was stopped. However, he has now been referred to new MH services, and is awaiting reinstatement of appropriate treatment to help maintain stability of his mental health status.
>
> He suffers from Angina on a background of Ischaemic Heart Disease. He is maintained on regular preventative medication therapy. He has been diagnosed with Gastro-Oesophageal Reflux Disorder, for which he receives appropriate medication therapy to control symptoms. He also suffers from Chronic Prostatitis, and has received treatment with antibiotic therapy.
>
> Although the conditions indicated above are of a chronic nature, they are all treatable providing the gentleman fully engages with appropriate treatment interventions. In my opinion, the medical evidence does not support the view of permanent incapacity to return to regular part-time or full-time employment within the next 7+ years."