

## Ombudsman's Determination

Applicant	Ms L
Scheme	NHS Pension Scheme
Respondents	NHS Business Service Authority ( <b>NHS BSA</b> )

## Outcome

1. I do not uphold Ms L'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. Ms L has complained that her application for the early payment of her benefits on the grounds of ill health has not been considered properly.

## Background information, including submissions from the parties

### Background

4. The relevant regulations are contained in the National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended). References to regulations in the following Determination are to regulations contained within the above statutory instrument. Extracts from the relevant regulations are provided in Appendix B.
5. Ms L was employed as a part-time (27 hours per week) research nurse until December 2013. In October 2014, Ms L submitted an application for the payment of her benefits on the grounds of ill health. Ms L's GP completed Part 2 of her application form. He stated she had been diagnosed with low back pain and left sided sciatica. He confirmed that Ms L had been seen by specialists and provided their contact details. He also provided details of Ms L's symptoms and the treatment she had received.
6. The form Ms L completed (AW240) is intended to enable deferred members of the Scheme to apply for the early payment of benefits. Ms L's application was treated as an application for the early payment of her deferred benefits (regulation L1). Her case was reviewed by NHS BSA's medical advisers, **OH Assist**. Ms L's application was declined on the basis that she had not demonstrated permanent incapacity for regular

employment of like duration. Summaries of the medical evidence relating to Ms L's case are provided in Appendix A.

7. Following correspondence from Ms L's MP, NHS BSA realised that Ms L was eligible to be considered for ill health retirement from active service (regulation E2A). This was because her employment had ceased on the grounds of ill health. Her case was referred back to OH Assist for consideration. OH Assist advised that Ms L did not meet the criteria; that is, she was not permanently incapable of carrying out the duties of her NHS employment. Ms L's application was declined. She appealed and her case was reviewed by another doctor at OH Assist, who again advised that she was not permanently incapable of carrying out the duties of her NHS employment. NHS BSA accepted this advice and declined Ms L's appeal. It also said that, for the purposes of her in-service retrospective ill health retirement claim, it could only consider the symptoms she was experiencing at the time her employment ceased.

### **Ms L's position**

8. The key points in Ms L's submissions are summarised below:
  - She was told that she could not add further illnesses to her application because her original claim was based on her back condition.
  - She has not worked since December 2013 and has been claiming Employment Support Allowance (**ESA**).
  - She is being treated for severe anxiety and depression and has been referred to a psychiatrist. She is under the care of her local community mental health team.
  - She is taking strong painkillers for her back condition, which is ongoing, and antidepressants. Her degenerative spine condition is not going to improve and her neurosurgeon has advised against surgery.
  - The last review for her spinal problems was in 2016 and conservative treatment was advised. She has not been examined by a consultant neurologist since to determine her current disability.
  - The NHS BSA's medical adviser has never examined her and has no idea how she manages daily life.
  - Her spinal degeneration is the result of years of hard work as a nurse when there were no lifting aids, etc.
  - She has had to use her savings, move to rented accommodation and is now in a difficult financial position.

### **NHS BSA's position**

9. NHS BSA's submission is summarised below:-

- It has properly considered Ms L's application; taking into account and weighing up all relevant evidence and nothing irrelevant.
- It has taken advice from a proper source; namely, the Scheme's medical advisers. It has considered this advice and accepted it. As a result, it has come to a decision which it believes cannot be considered to be perverse.
- Ms L does not meet the Tier 1 or Tier 2 criteria because she is not permanently incapable of carrying out the duties of her NHS role or alternative employment of like duration.
- Its medical advisers' recommendations were founded upon the correct interpretation of the Scheme's regulations and took into account relevant evidence.
- Medical matters are seldom black and white. A range of opinions may be given from a variety of sources. The fact that Ms L does not agree with its decision or the weight it attaches to any of the evidence does not mean its conclusions are flawed.
- If Ms L's case is to be reviewed under regulation L1(3)(b), it would prefer her to submit a fresh application form (AW240). This would provide her with an opportunity to submit any additional medical evidence which she considers would assist its medical adviser to make a recommendation.

## **Adjudicator's Opinion**

10. Ms L'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 was not the role of the Ombudsman to review the medical evidence and come to a decision as to Ms L's eligibility for payment of benefits under regulation E2A. The Ombudsman was primarily concerned with the decision making process. Medical (and other) evidence was reviewed in order to determine whether it supported the decision made. The issues considered included: whether the relevant regulations had been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision was supported by the available relevant evidence. However, the weight which was attached to any of the evidence was for NHS BSA to decide (including giving some of it little or no weight)<sup>1</sup>. It was open to NHS BSA to prefer evidence from its own advisers; unless there was 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 regulations by the

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<sup>1</sup>*Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

medical adviser. If the decision making process was found to be flawed, the appropriate course of action was for the decision to be remitted for NHS BSA to reconsider.

- To be eligible to receive Tier 1 benefits under regulation E2A, Ms L's employment had to have been terminated because she was permanently incapable of efficiently discharging the duties of that employment. For Tier 2 benefits, she had also to be permanently incapable of regular employment of like duration. NHS BSA declined Ms L's application on the basis of advice it received from OH Assist.
- It was clear, from the quoted reports, that the OH Assist doctors were aware of the eligibility criteria set out in regulation E2A. There was nothing to suggest that they misinterpreted the regulation. They were also aware of the nature of Ms L's NHS role. Their reason for recommending that her application be declined was that her back condition would not preclude her from carrying out a role which was not physically demanding. This was not inconsistent with what was being said by Ms L's treating physicians. Just prior to the termination of her employment, Ms L was considered unfit for work but this incapacity did not appear to have been considered to be permanent. The Adjudicator had not been able to identify any error or omission of fact which would suggest NHS BSA should not have accepted the advice it received from OH Assist.
- In the Adjudicator's view, the decision to decline Ms L's application, for the early payment of her benefits on the grounds that she did not meet the eligibility requirements of regulation E2A as at the date her employment terminated, could not be said to amount to maladministration.
- It was clear from the available evidence that Ms L's back condition was not the only health issue she was experiencing. Ms L had said that she was not able to "add on" other illnesses because her original claim was based on her back condition. So far as her eligibility under regulation E2A was concerned, this was correct. Ms L had to meet the eligibility criteria as at the date her employment ceased and, therefore, it was the condition which she was suffering from then which was the key.
- However, Ms L still retained the right to be considered under regulation L1 for early payment of her deferred benefits at any time before her normal pension age. The benefits would not be enhanced in the same way as under regulation E2A but they could be paid at any time if Ms L met the eligibility criteria. When assessing whether Ms L meets the eligibility criteria under regulation L1, NHS BSA could take into account any subsequent health conditions. OH Assist referred to the fact that Ms L was suffering from other health problems but these had not been considered in any detail.
- The Adjudicator noted that the Scheme's regulations required Ms L to make a claim in writing for the early payment of her benefits. She had done so in 2014

by completing form AW240. This had resulted in her case initially being treated as a claim for early payment of her deferred benefits. The Adjudicator suggested that NHS BSA refer Ms L's case back to OH Assist, together with the additional medical evidence Ms L has since provided, and ask that it be reviewed again under regulation L1.

11. Ms L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms L 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 Ms L for completeness.

### **Ombudsman's decision**

12. To qualify for early retirement on the grounds of ill health under regulation E2A, Ms L had to have met the eligibility criteria at the time her employment ceased. Her employment had to have been terminated because she was then considered permanently incapable of performing her NHS duties.
13. NHS BSA, on the advice of OH Assist, has determined that Ms L did not meet the regulation E2A criteria at the time her employment ceased. The medical evidence from Ms L's own doctors supports this decision. The expectation, in 2013, was that she would recover sufficiently to be able to undertake the duties of her former role with further treatment. I acknowledge that Ms L has not worked since her employment ceased in 2013 and she is currently in receipt of ESA. However, the fact that expectations of recovery are not realised is not, in and of itself, evidence that the decision is incorrect. The assessment must be whether it was reasonable to expect Ms L to recover on the basis of her condition as it was in December 2013. The medical evidence from that time supports this view.
14. I note Ms L's reference to the fact that the NHS BSA's medical advisers did not examine her. This is largely a matter for the doctors' own professional judgment. They are being asked to give an opinion. It is really for them to judge whether they have sufficient evidence before them to provide an opinion. If the medical advisers had not been provided with any medical evidence relating to Ms L's case, I might come to a different view. But this was not the case here. NHS BSA's advisers had been provided with relevant up-to-date evidence from Ms L's own doctors.
15. I do not find that there was maladministration on the part of NHS BSA in coming to the decision not to pay Ms L benefits under regulation E2A.
16. Ms L has clearly suffered a deterioration in her health since December 2013. I note she is currently receiving treatment for anxiety and depression. She has also referred me to information relating to degenerative disc disease. This is not relevant to assessing her eligibility for benefits under regulation E2A. However, it could be taken into account in looking at her eligibility for the early payment of her benefits under

regulation L1. Ms L's eligibility under regulation L1 can be considered at any time up to her normal retirement age.

17. At the suggestion of my Adjudicator, NHS BSA has indicated that it is willing to consider Ms L's eligibility under regulation L1. It has, however, said it would prefer her to complete a fresh application. This would seem to be an appropriate way forward. I suggest NHS BSA now sends Ms L the appropriate form for her to complete.

**Anthony Arter**

Pensions Ombudsman  
21 February 2018

## **Appendix A**

### **Medical evidence**

#### **Mr Slater (consultant orthopaedic surgeon), 27 March 2013**

18. In a referral letter to a consultant in pain control, Mr Slater said Ms L had multi-level disc degeneration. He said there was a moderate sized prolapse at the L5/S1 level on her left side. He suggested an epidural injection and said the disc prolapse was not of a dimension to justify surgery. Mr Slater said he had discussed Ms L's work and he did not have enough reason to recommend that she stop doing work of the kind she was engaged in. He said he would not recommend sitting for eight hours per day or heavy physical activity. He thought the combination Ms L's role offered would be acceptable.

#### **Dr Norman (consultant anaesthetist and pain management specialist), 29 April 2013**

19. In a letter to Mr Slater, Dr Norman said Ms L's back and leg pain had become worse. He referred to the results of MRI scans. He said these showed considerable change at L5/S1 level, which was stable, changes at L4/5, which had evolved, and changes at T2 and T3/4, which were stable. Dr Norman said he was a little unsure what the target would be but said Ms L had been given injections at L4/5 and L5/S1. He mentioned she had had "significant life stresses of late", which they had discussed.

#### **Ms Nicassio (Spinal Fellow to Mr Malik, consultant neurosurgeon), 21 August 2013**

20. Ms Nicassio said Ms L had been experiencing left sided sciatica and numbness. She said Ms L did not show any symptoms of nerve root compression. Ms Nicassio said an MRI scan had shown some disc degeneration and Mr Malik had recommended conservative treatment.

#### **Mr Kemp (extended scope physiotherapist), 23 September 2013**

21. In a letter to Ms L's GP, Mr Kemp said her left leg pain had resolved but she now had right leg sciatica with paraesthesia and numbness. He suggested a further MRI scan.

#### **Dr Bell (consultant occupational physician), 17 October 2013**

22. Ms L had seen Dr Bell on a number of occasions in 2013. In his letter to Ms L's employer, Dr Bell referred to his previous report, in which he had recommended a phased return to work. He said Ms L had developed new symptoms in her right side which had prevented her return to work. Dr Bell said Ms L needed a further neurosurgical opinion and he thought there was a fair chance she would be offered surgery. He said she was not well enough to return to work at that point and he would see her again in six weeks.

#### **OH Assist, 10 November 2014**

23. In its notification of rejection to Ms L, OH Assist quoted from the doctor who had reviewed her case. The doctor noted Ms L had applied for early payment of her

deferred benefits and quoted the eligibility criteria from regulation L1(3)(b). She noted Ms L was a former nurse who had been working for 27 hours per week. She then listed the medical evidence she had considered. This included letters from Ms L's specialists dating from March to September 2013. It also included Dr Bell's letter dated 17 October 2013.

24. The OH Assist doctor reviewed the specialists' letters. She noted an orthopaedic surgeon had referred to Ms L's back pain worsening in April 2013 and that she had developed new symptoms. She noted injection treatment had been planned. The doctor noted the results of an MRI scan in August 2013, which had shown disc degeneration but no nerve root compression. The doctor noted that the consultant neurosurgeon had not recommended surgery and Ms L had been treated with physiotherapy and pain management. She noted a report from September 2013 had said Ms L's left sciatica symptoms had resolved and new right sided symptoms were to be investigated.

25. The OH Assist doctor concluded:

"Reasonable treatment in this case would very likely include:

- Neurosurgeon review
- Physiotherapy
- Multi disciplinary pain team involvement.

With such treatment, this member is more likely than not to regain capacity for low physical demand, sedentary/semi sedentary, regular employment, 27 hours per week, with good workplace ergonomics and with the facility to regularly rest from standing and mobilise from sitting."

**Mr Thakur (SpR to Mr Malik), 6 July 2015**

26. In a letter to Ms L's GP, Mr Thakur said he had reviewed an MRI scan from February 2015. He said there were some wear and tear changes throughout Ms L's lumbar spine, but nothing which would require surgery or prohibit her from returning to work as a nurse. He said there should be no restrictions to Ms L's activity.

**Mr Janous (Spinal Fellow), 21 January 2016**

27. In a letter to Ms L's GP, Mr Janous said he had reviewed Ms L. He said an MRI scan had shown a certain level of wear and tear but no significant narrowing requiring surgery. He recommended conservative treatment and asked Ms L's GP to organise physiotherapy and a local pain management programme. He said he would discharge her from further follow up.



**OH Assist, 19 July 2016**

28. At stage one of the appeal process, NHS BSA quoted from the OH Assist doctor who had reviewed Ms L's case.
29. The doctor referred to the eligibility criteria set out in regulation E2A. He listed the medical evidence considered which included Ms L's GP records, letters from her employer's occupational health physician and a letter from her neurosurgeon, dated 21 January 2016. The doctor advised:

"This lady has a history of low, back pain dating from 2010. In 2012/13, she was subject to significant life stressors and, in early 2013, suffered an exacerbation of low back pain radiating to the left lower limb. She was referred for surgical assessment. An MRI scan confirmed evidence of degenerative disc disease in the region L3-S1, but no evidence of nerve root or neural compression. On a background of suffering from mechanical back pain, she was referred for epidural injection therapy and physiotherapy. These were of limited benefit and, later that year, she developed bilateral leg symptoms. However, there remained no indication for spinal surgery intervention, and the treatment remained of a conservative nature.

More recently, after termination of her employment, she suffered additional health problems in respect of her psychological health, worries of a cardiac arrhythmia, and knee and shoulder pain. Subsequent investigations have confirmed sinus tachycardia with occasional ectopics, a band friction syndrome affecting her right knee, and early arthritis of the shoulder joint.

In my opinion, none of these more recent health problems would be regarded as a source of permanent incapability to return to her NHS role. Similarly, the general treatment for mechanical back pain is to encourage light activity and regular exercise, and there is no evidence to suggest that she would be incapable of a return to her NHS role that is of a research nature and does not involve heavy manual handling ..."

**OH Assist, 2 February 2017**

30. In its stage two appeal notification, NHS BSA quoted from the OH Assist doctor who had reviewed Ms L's case.
31. The doctor again began by setting out the eligibility criteria from regulation E2A. He also described Ms L's former NHS role. In particular, he noted there were no specific requirements for moving or handling patients or heavy loads. The medical evidence listed was the same as that considered at stage one. The doctor reviewed the medical evidence and also noted that evidence relating to Ms L's shoulder problems, depression, knee problems and cardiac investigations had not been considered. This was because they arose after the cessation of Ms L's employment. He concluded:

“Overall, the evidence indicates that as at the date of consideration (after dismissal from work in December 2013) she had low back pain without significant nerve compromise. At that time it would have been concluded, on the evidence presented, that with further active rehabilitation the symptoms on the right side would have resolved, similarly to those on the left side. They had only started in late 2013 and it is expected that around 50% of those who suffer such pain will find it resolves within 6 weeks, around 75% resolve within 6 months and 90% resolve within a year. In December 2013 it was simply too soon for her to have recovered from the right sided sciatic pain.

Had there been an application and two appeals, these would have been likely to have been concluded by the end of 2014 or early 2015. It is likely that a report would have been sought from the neurosurgeon who was to see her in January and review her in July and this would have been strongly indicative of her NOT being considered permanently unfit for her role. Her particular nursing role was of low physical demands, because she had previously suffered from back pain and this influenced her career direction. It would have been quite reasonable to expect that she would be fit for such a role on the balance of probabilities.

Subsequent evidence is not indicative that the medical advisers got her diagnosis wrong, or that she was not appropriately investigated and treated.

It is accepted that a number of other conditions have affected her health subsequently.”

### **Other medical evidence**

32. Ms L has provided other medical evidence which post-dates NHS BSA's decision. This has been noted but is not summarised here because it is not directly relevant to assessing that decision. Any decision is assessed by reference to the evidence which was, or could have been, available at the time it was taken.

## Appendix B

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

33. As at the date Ms L's employment ceased, regulation E2A provided:

- “(1) This regulation applies to a member who -
  - (a) retires from pensionable employment on or after 1st April 2008;
  - (b) did not submit Form AW33E (or such other form as the Secretary of State accepted) together with supporting medical evidence if not included in the form pursuant to regulation E2 which was received by the Secretary of State before 1st April 2008, and
  - (c) is not in receipt of a pension under regulation E2.
- (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) the member has at least 2 years qualifying service or qualifies for a pension under regulation E1; 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.

...

- (13) For the purposes of determining whether a member is permanently incapable of efficiently discharging the duties of the member's employment under paragraph (2)(b)(i), the Secretary of State shall have regard to the factors in paragraph (15) (no one of which shall be decisive) and disregard the member's personal preferences for or against engaging in that employment.
- (14) For the purposes of determining whether a member is permanently incapable of regular employment under paragraph (2)(b)(ii), the Secretary of State shall have regard to the factors in paragraph (16) (no one of which shall be decisive) and disregard the factors in paragraph (17).

- (15) The factors to be taken into account for paragraph (13) are -
- (a) whether the member has received appropriate medical treatment in respect of the incapacity;
  - (b) the member's -
    - (i) mental capacity; and
    - (ii) physical capacity;
  - (c) such type and period of rehabilitation which it would be reasonable for the member to undergo in respect of the member's incapacity, irrespective of whether such rehabilitation is undergone; and
  - (d) any other matter which the Secretary of State considers appropriate.
- (16) The factors to be taken into account for paragraph (14) are -
- (a) whether the member has received appropriate medical treatment in respect of the incapacity; and
  - (b) such reasonable employment as the member would be capable of engaging in if due regard is given to the member's -
    - (i) mental capacity;
    - (ii) physical capacity;
    - (iii) previous training; and
    - (iv) previous practical, professional and vocational experience,irrespective of whether or not such employment is actually available to the member;
  - (c) such type and period of rehabilitation which it would be reasonable for the member to undergo in respect of the member's incapacity (irrespective of whether such rehabilitation is undergone) having regard to the member's -
    - (i) mental capacity, and
    - (ii) physical capacity:
  - (d) such type and period of training which it would be reasonable for the member to undergo in respect of the member's incapacity

(irrespective of whether such training is undergone) having regard to the member's -

- (i) mental capacity,
  - (ii) physical capacity,
  - (iii) previous training, and
  - (iv) previous practical, professional and vocational experience, and
- (e) any other matter which the Secretary of State considers appropriate.

(17) The factors to be disregarded for paragraph (14) are -

- (a) the member's personal preference for or against engaging in any particular employment; and
- (b) the geographical location of the member.

(18) For the purpose of this regulation -

“appropriate medical treatment” means such medical treatment as it would be normal to receive in respect of the incapacity, but does not include any treatment that the Secretary of State considers -

- (a) that it would be reasonable for the member to refuse,
- (b) would provide no benefit to restoring the member's capacity for -
  - (i) efficiently discharging the duties of the member's employment under paragraph (2)(b)(i), or
  - (ii) regular employment of like duration under paragraph (2)(b)(ii),before the member reaches normal benefit age; and
- (c) that, through no fault on the part of the member, it is not possible for the member to receive before the member reaches normal benefit age;

“permanently” means the period until normal benefit age; and

“regular employment of like duration” means -

- (a) ...
- (b) in all other cases, where prior to retiring from employment that is pensionable the member was employed -

- (i) on a whole-time basis, regular employment on a whole-time basis;
- (ii) on a part-time basis, regular employment on a part-time basis,

regard being had to the number of hours, half-days and sessions the member worked in that employment.”

34. At the time of Ms L’s application for the early payment of her benefits, regulation L1(3) provided:

“The member shall be entitled to receive the pension and retirement lump sum before age 60 if -

- (a) the member is in NHS employment and the Secretary of State is satisfied that the member is suffering from mental or physical infirmity that makes him permanently incapable of efficiently discharging the duties of that employment;
- (b) the Secretary of State is satisfied that the member is suffering from mental or physical infirmity that makes him permanently incapable of engaging in regular employment of like duration ; ...”

35. The factors to be taken into account and the definitions which applied within regulation L3 were the same as for regulation E2A above.