PO-18582

Ombudsman's Determination

Applicant	Mrs Y
Scheme	NHS Pension Scheme
Respondent	NHS Business Services Authority (**NHSBSA**)

Outcome

1. I do not uphold Mrs Y's complaint and no further action is required by NHSBSA.

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

Complaint summary

3. Mrs Y complains that NHSBSA has wrongly declined her application for payment of her pension on grounds of ill health early retirement (**IHER**) from the Scheme.

Background information, including submissions from the parties

4. The relevant legislation can be found in Regulation E2A of the NHS Pension Scheme Regulations 1995 (as amended) (the **Regulations**).

> E2A
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> "A member to whom this regulation applies who retires from pensionable employment before normal retirement age shall be entitled to a pension under this regulation if…the member's employment is terminated because of physical or mental infirmity as a result of which the member is -
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> (i) Permanently incapable of efficiently discharging the duties of that employment (the 'tier 1 condition'); or
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> (ii) Permanently incapable of regular employment of like duration (the 'tier 2 condition') in addition to meeting the tier 1 condition."

5. Mrs Y has a history of a frozen shoulder, which she first reported to her GP in March 2014. She underwent several types of treatment, including surgery, but experienced little improvement.

6. At the time, Mrs Y was working as a part-time Senior Midwife with Northumbria Healthcare NHS Trust (the **Trust**).

7. On 19 February 2016, Mrs Y's GP wrote to Occupational Health regarding her condition. After summarising her medical history and mentioning the various treatments she had tried, including an arthroscopic capsular release, post-operative physiotherapy, manipulation under anaesthetic and steroid injection, the GP said:

> "It is very difficult to predict the future at any time but especially in a situation in which a clear diagnosis has not been achieved and further strategies are yet to be tried. However, I believe that [Mrs Y] has made every effort over the last 2 years of this problem, complied with every suggested approach to investigation, and gone along with every therapy recommended too. The fact is however that there has been no fundamental change to the symptoms and the limitations they impose on her, only a degree of waxing and waning. Her attempt to return to work confirmed that her shoulder cannot cope with the rigours of her role.
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> Given this context, I feel a recovery sufficient to enable her to resume working as a midwife would be years away at best and could not be confidently be expected to ever happen. There is a reasonable chance that her symptoms will improve in the coming years but only with protection from repeated physical stress; and such improvement may only persist as long as it remains protected from loads. Full recovery seems a particularly unlikely outcome.
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> …I entirely support the application for ill health retirement as it is not foreseeable that she will be able to return to work in future in the capacity of a midwife".

8. On 22 March 2016, following a period of sickness absence starting from 1 April 2014 and punctuated by failed attempts to return to work, Mrs Y was informed that her employment would be terminated on 4 May 2016.

9. Mrs Y subsequently applied for IHER benefits due to severe adhesive capsulitis and associated conditions.

10. Form AW33E, completed by the Occupational Health Physician on 6 April 2016, included the following statements:

> "[Mrs Y] has undergone all recognised medical treatment including acupuncture, physiotherapy, has been under orthopaedics and has also had an arthroscopy and decompression in January 2015 followed by manipulation under anaesthetic in June 2015 with a poor response. She has also recently had a nerve root injection into her cervical spine to identify if surgery would likely be possible and unfortunately reported improvement has been slow and her symptoms remain unchanged…

> Please see attached specialist letter which confirms all relevant treatments unfortunately these have not been successful in improving her health condition…
>
> As she has had poor response to conventional treatments her health condition is unlikely to improve over the period to normal pension age…"

11. On 10 April 2015, an Occupational Health report to the Trust stated:

> "Based on my assessment today, [Mrs Y] is not fit to return to her current role as a Senior Midwife at present. Given that her recovery has been very slow, it is difficult to comment on a time scale for her return to this role in the future. Her specialist has advised that she could consider returning to work in a light capacity on amended duties and perhaps restricted hours. I would advise you to explore if she can be supported in a role which does not involve any repetitive movements, heavy lifting or overhead lifting, prolonged writing or driving. If such a position can be identified until her rehabilitation is complete, she can be supported to return to work with a phased return.
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> The literature on the surgery suggests that although 70-80% of the recovery takes place by three months post-operatively, full recovery can take up to 9 months. It is likely that this is going to be further delayed in [Mrs Y's] case considering limited progress so far. Given that this surgery was performed less than three months ago, it is too early to comment on a prognosis and likelihood of full recovery at present. Therefore, it is my view that an ill health retirement application is likely to be unsuccessful at this stage."

12. On 4 May 2016, Mrs Y left her NHS employment.

13. On 26 May 2016, NHSBSA wrote to Mrs Y saying that it was unable to accept her IHER application. The rationale of the Scheme's medical adviser is quoted, in part, below:

> [Mrs Y] has been unable to work due to ill health since April 2014. She developed pain and restricted movement in her right shoulder and was diagnosed with adhesive capsulitis.
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> She underwent an arthroscopy and decompression in January 2015 followed by manipulation under anaesthetic in June 2015. Mr. Couto [Consultant Orthopaedic Surgeon] advises in March 2016 that regarding her frozen shoulder, she has now regained an essentially full range of movement. However, as she was still experiencing neuralgic pain she was referred for further investigation…
>
> It is accepted that [Mrs Y] is currently unfit for work and is likely to remain so for some time. However, the issue is whether it is likely with appropriate medical treatment she would be able to resume her part time duties as a midwife.

> At the moment [Mrs Y]'s neck problems are being actively managed by the orthopaedic specialist. Mr. Jensen [Consultant Orthopaedic Surgeon] is of the opinion that should she proceed to decompressive surgery on her neck, there is the likelihood of a full recovery from her symptoms. Long term prognosis would be good at this stage. He also advises that treating conservatively there is a fairly good chance that the nerve root impingement would settle either by the disc retracting spontaneously, as most of them do, or by the nerve settling down from being irritated and sometimes the nerve block can help this.
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> There still remains scope for improvement in her symptoms and function with ongoing medical treatment. It is considered that this is likely to be sufficient to enable her to resume the duties of her part time NHS role as a Midwife before her normal benefit age of 60 in just over eleven years' time. Permanent incapacity is not accepted…
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> It is my opinion that relevant medical evidence has been considered in this case and, on the balance of probabilities, indicates:
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> That the applicant is not permanently incapable of the NHS employment, the NHS Pension Scheme condition for Tier 1 is not met and
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> That the applicant is not permanently incapable of regular employment of like duration, the NHS Pension Scheme condition for Tier 2 is not met".

14. A letter from Mr Jensen to Occupational Health, dated 7 July 2016, included the following extract:

> "Regarding my previous report I did say that [Mrs Y] would be likely to make a full improvement following surgery however I also said that she would only be offered surgery if she were to have responded to a C6 nerve root block. As it happens she in fact didn't respond at all well to the C6 nerve root block if anything it made her worse rather than better. She is therefore not a candidate for any surgical treatment and I can't say that I think that the disc in her neck is causing the pain in her arm and her facial pain and numbness and the headaches. The arm weakness may well be all contributed to her shoulder pathology or some underlying neurological defect which is as yet to be diagnosed.
>
> …we have re-referred her to the neurologists in Newcastle…We have also asked for nerve conduction studies…
>
> I share her concern that with a weak arm and the symptoms of pain that she is suffering she is unlikely to be able to perform her role as a midwife safely".

15. On 8 August 2016, Mr Jensen wrote to Mrs Y saying that they "haven't been able to find a spinal cause for your symptoms and very much hope that you have more success in managing your symptoms and possibly coming to a diagnosis in the future". He referred her back to her GP to arrange further tests.

16. On 1 September 2016, Mrs Y complained to NHSBSA under the Scheme's internal dispute resolution procedure (**IDRP**).

17. On 4 November 2016, Mrs Y's GP wrote to Occupational Health with additional information. The GP summarised her medical history and made the following conclusion:

> "In November 2015, [Mrs Y] saw a second orthopaedic surgeon who proposed a C6 nerve block. [Mrs Y] agreed to this but it too failed to help. Having subsequently arranged EMG studies which failed to find fault with the cervical nerve supply to her right arm and shoulder, he discharged her with the suggestion, attributed to the neurologist, that the problem might be functional rather than organic…
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> Given the impasse in terms of specialist input, there is currently no further plan for investigation or treatment. It is hard to imagine what could reasonably be added to what has already been tried. Given this, it is equally hard to imagine that [Mrs Y] will ever be able to work as a midwife again. Of course, none of us can predict the future with complete confidence but on the balance of probabilities I believe [Mrs Y] therefore fulfils the criteria for Tier 1".

18. On 25 November 2016, after reviewing the letter from Mrs Y's GP and other information, NHSBSA responded to the complaint under stage one of IDRP. NHSBSA quoted the medical adviser's rationale as follows:

> "There remains scope for significant improvement in [Mrs Y's] symptoms and functional abilities with specialist pain management intervention, sufficient to enable her to be successfully rehabilitated into her former employment as a Midwife."

19. They said that, having considered all the medical evidence and the comments from the medical adviser, they could not see any reason to disagree with the decision that Mrs Y was not entitled to IHER benefits from the Scheme.

20. On 3 March 2017, Mrs Y's GP wrote to her regarding her condition. This is an extract from the letter:

> "…I am writing to clarify my advice following receipt of Dr Goldsmith's letter last July…My own opinion is that, despite the failure of [the Surgeon] to help you with his two surgical interventions, the problem was and remains one to do with your right shoulder. Given the extensive physiotherapy and orthopaedic input you received prior to last summer, I did not feel that there was anything much to be gained by heading back in that direction following Dr Goldsmith's and [Mr] Jensen's final opinions being received…Things remain the same with your shoulder now and I still feel there is nothing extra we can reasonably offer by way of either investigation or therapy".

21. In May 2017, Mrs Y appealed against the decision under stage two of IDRP.

22. On 22 June 2017, NHSBSA issued their stage two decision. They considered the GP's letter to Mrs Y, among other documents. NHSBSA quoted the medical adviser as follows:

> "The clinical evidence base for functional health conditions indicate that symptoms would be anticipated to respond to a combination of treatment interventions that include chronic pain management (usually with appropriate pain medical therapies), access to psychotherapy intervention (typically a course of Cognitive Behavioural Therapy (CBT) of at least 15-20 sessions) and muscle reconditioning intervention with physiotherapy and graded self-exercise. There is no evidence that this lady has been referred for such treatment interventions.
>
> In my opinion, based on the balance of probabilities, symptom improvement would be anticipated with access to full and appropriate functional interventions, sufficient to enable a return to her part-time NHS role at some point prior to the Normal Benefit Age".

23. NHSBSA did not uphold the complaint.

24. Mrs Y disagreed with the decision by NHSBSA and brought her complaint to us. She said that she has not had a physical examination by a qualified health professional to confirm her disability and incapacity to work as a midwife. NHSBSA has ignored the reports from Occupational Health and her GP which confirm that she cannot return to work as a midwife before her normal retirement age. She pointed out that NHSBSA have not acknowledged her failure to return to work and that, despite different treatments, there has not been any improvement in her shoulder. She says that NHSBSA could request further information from her GP and Pilates instructor.

Adjudicator's Opinion

25. Mrs Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHSBSA. The Adjudicator's findings are summarised below:-

- NHSBSA did not agree with the opinion of Mrs Y's GP that she met the criteria for tier 1 benefits, but NHSBSA are entitled to have a different view if it has reasonable grounds for doing so. The Adjudicator was satisfied that NHSBSA took account of all relevant medical reports available, including those by Mrs Y's GP, before making its decision.

- It was not unreasonable for NHSBSA to turn down Mrs Y's application in May 2016, in reliance on the untried treatments of decompression and nerve root block, recommended by Mr Jensen. At the time, they could not have known that the treatments would make matters worse.

- Subsequently, at stage one of the IDRP, NHSBSA did not provide any evidence as to why specialist pain management intervention would be expected to provide "significant improvement" in the face of other failed treatments. Accordingly, NHSBSA should have clarified the treatment being referred to, and the likelihood that this will produce sufficient results to be able to conclude that significant improvement would be expected.

- This oversight was remedied at stage two of the IDRP. There was no guarantee that the recommended treatments would result in Mrs Y being completely pain free in the future, but the Regulations do not go this far anyway; only that she should be incapable of efficiently discharging the duties of her employment before her normal retirement age.

- The Adjudicator was satisfied that the medical adviser gave due regard to Mrs Y's medical condition, the treatment she had undergone, and any rehabilitation it would be reasonable for her to undergo. NHSBSA followed the correct process when assessing Mrs Y's application.

- Mrs Y has been examined by medical professionals such as the Consultant Orthopaedic Surgeons and her GP. The stage one and two decisions demonstrate that NHSBSA considered the reports prepared by those medical professionals. Nonetheless, Mrs Y's future prognosis remains unclear, as the medical professionals cannot agree a way forward.

- It is not perverse for NHSBSA to prefer the opinion of its medical adviser over others, and it has provided its reasons for doing so.

- Termination of Mrs Y's employment, on grounds of health capability, would not automatically result in a successful application for IHER benefits.

- We can only take into account the information available to NHSBSA at the time it reviewed Mrs Y's application.

26. Mrs Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs Y provided her further comments, but these 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 Y for completeness.

Ombudsman's decision

27. Mrs Y says that the Occupational Health Physician did not perform a physical examination on her, and NHSBSA has simply relied on the opinions of the medical advisers. She points out that her condition has not improved in over four years, despite undergoing several different treatments. She has not been able to return to work as no employer would assess her as being fit to work as a midwife.

28. Before making its decision, NHSBSA referred to the available medical reports produced by qualified medical professionals that had carried out physical examinations on Mrs Y. She had attended numerous appointments with two Consultant Orthopaedic Surgeons, a neurologist and her GP, all of whom produced medical reports recording her condition. In any event, Mrs Y also attended an appointment with a different Occupational Health Physician on 10 April 2015, with follow-up reports in June 2015, July 2015 and January 2016. Bearing this in mind, I find that there was no need for NHSBSA to arrange for a separate physical examination on Mrs Y, when sufficient other examinations by qualified medical professionals were available. The divergence of medical opinion is no reflection on the lack of direct physical examination by NHSBSA or the medical adviser, and this is not unusual in such circumstances.

29. NHSBSA has to consider the opinion of its medical advisers, as well as any other relevant opinions/reports, but the decision on whether to accept Mrs Y's IHER application would be made by NHSBSA alone. I have not found any evidence that this process was flawed, such that the decision should be remitted back to NHSBSA.

30. I acknowledge Mrs Y's comments that her condition has not improved in the meantime but, as explained by the Adjudicator, our review is limited to her condition and circumstances when NHSBSA made the decision on her IHER application. It does not extend to an assessment of her present condition or fitness for employment.

31. Therefore, I do not uphold Mrs Y's complaint.

Anthony Arter
Pensions Ombudsman
30 January 2019