

Ombudsman's Determination

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| Applicant | Mrs R |
| Scheme | NHS Pension Scheme (the Scheme) |
| Respondent | NHS Business Services Authority (NHS BSA) |

Outcome

1. Mrs R's complaint is upheld and, to put matters right, NHS BSA should reconsider its decision not to award her Ill Health Retirement benefits.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs R's complaint against NHS BSA, the Scheme manager, is that it has not accepted her application for Ill Health Retirement (**IHR**) benefits.

Background information, including submissions from the parties

4. Mrs R was an employee of the NHS and a member of the Scheme. As such, she was potentially entitled to IHR benefits. Regulation E2A of the NHS Pension Scheme Regulations 1995 (as amended) (**the Regulations**) (see Appendix) provides: -

"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... 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 the tier 1 condition."
5. In October 2015, a Dr Spurlock, occupational health physician, recommended Mrs R for ill health retirement. She stated: -

"Given the failure of further treatment I would consider [Mrs R] unfit for work in the long term. It's unlikely she would be suitable for any alternative role given

the level of her pain and the limitations this causes on her function. In my opinion, ill health retirement seems the most appropriate next step...”

6. In December 2015, following a period of long term sickness dating back to October 2014, Mrs R’s employment ended on grounds of ill health.
7. In January 2016, Mrs R applied to NHS BSA for IHR benefits, based on chronic lower back pain, anxiety, and depression. She was 54 years of age.
8. In the same month, NHS BSA rejected Mrs R’s application. Its reasons were: -
 - Mrs R’s sickness record showed absence since October 2014. Her employer had been reviewing her since May 2015, but stated, “the seriousness of her condition meant that adjustments could not be implemented and she could not return to work in any capacity...”
 - It had considered evidence from a Dr Sajjad, consultant in pain management, stating, “Increase in Pregabalin and bilateral facet joint injections were suggested. [Mrs R] is going to think about the latter. Injections will help with the pain if they work but will not cure the underlying wear and tear”.
 - It had considered evidence from a Dr Sinfield, Mrs R’s GP, stating, “[Mrs R] has been consulting for back pain for a year. She has had poor response to most treatments tried including analgesia (neuropathic and opioid), physiotherapy and acupuncture... Some recovery is hoped for over time but there is extremely low likelihood of her being able to return to work in her former capacity.”
 - It had also considered evidence from a Dr Spurlock, an occupational health physician, who stated, “Low back pain may improve with further treatment, however, given the psychological element of her illness this seems unlikely.”
 - Finally, two different types of possibly effective treatment were outlined: medications in combination with various therapies; and, planned pain specialist involvement.
 - However, NHS BSA turned down Mrs R’s application stating: “It is acknowledged that treatment may well take some time, however it is considered that [Mrs R] is more likely than not to be clinically capable of her NHS role, within the period to normal benefit age (60 years) given compliance with reasonable treatment... [Mrs R] is not permanently incapable of the NHS employment, the NHS Pension Scheme condition for Tier 1 are not met and... [Mrs R] is not permanently incapable of regular employment of like duration, the NHS Pension Scheme condition for Tier 2 are not met.”
9. In February 2016, Mrs R appealed.
10. In April 2016, NHS BSA responded under stage one of the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). It outlined the background to the case and summarised the medical evidence considered, but it turned down the application again. Its Medical Adviser stated: -

“My advice to the NHS Pensions is that, on the balance of probability, [Mrs R] is not permanently incapable of the duties of the NHS employment and therefore the Tier 1 condition is not satisfied.

This lady has suffered from lower back pain over a number of years. The pain was aggravated when she jolted her back whilst pushing a wheelchair. She was referred for MRI scan investigation which confirmed a degenerative lumbar spine with facet joint degeneration, but no evidence of neural compromise.

On a background of a diagnosis of mechanical back pain, she has received treatment with physiotherapy and acupuncture, with little benefit, and was referred for assessment at the Pain Clinic. Treatment with pain relief medication was prescribed, and facet joint injection therapy was offered. The lady has not sought re-referral to the Pain Clinic for such treatment...

Although this lady is currently struggling with prolonged walking or standing, her back pain would be anticipated to improve with regular activity and light exercise. Her current low mood, exacerbated by back pain and family health issues, would be anticipated to resolve with appropriate treatment intervention.

Nursing duties are nowadays organised to minimise the need for heavy lifting by the provision of hoists and handling devices. In my opinion, the evidence would not support a permanent incapacity to return to her NHS role prior to Normal Benefit Age...

My advice to the NHS Pensions is that on the balance of probabilities: Neither the NHS Pension Scheme Tier 1 nor the Tier 2 condition is met.”

The NHS BSA decision-maker herself stated: “Having very 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 [Mrs R] is not entitled to [IHR] benefits from [the Scheme].”

11. In May 2016, a Dr Sinfield, Mrs R's GP, wrote to NHS BSA. She stated: -

“... [Mrs R] has been through the physiotherapy service and the pain clinic without any real improvement in her day-to-day symptoms. She has tried a variety of different medications, again, none of which have provided much relief. Currently her mobility is extremely limited. She is only able to walk a matter of meters and that is with the help of a walking stick. I find it very difficult to believe that she is going to recover to the extent that she would be able to perform her nursing duties... Therefore, on the balance of probability, I would find it extremely unlikely that [Mrs R] would improve to a level that she could function effectively in a nursing role. Furthermore currently I would actually think that returning to work for her would worsen her symptoms.”

12. In June 2016, Mrs R underwent further treatment for pain. She accepts a discharge note, dated 26 July 2016, indicates she was discharged following an improvement in

her pain symptoms. But she says she spoke with her GP after that, and explained this was not the case. In fact, a GP record of 11 July 2016, stated, “some improvement, not huge”. In addition, another record, dated 1 August 2016, stated, “no better from injection... dc [discharge letter] letter not helpful – says helpful therefore discharged... mindful that nothing much has helped now...”

13. In January 2017, a Dr Charlesworth-Jones, a GP, occupational health doctor and author of personal injury and clinical negligence reports, provided a further report into Mrs R’s condition. He stated: -

“The GP records contain a consultation note dated 11.7.16... which records “had spinal injections, some improvement, not huge”. I have been able to put this to [Mrs R] and she says she is in disagreement with the accuracy of it: she referred me to GP consultation which followed, the content of which she does agree... The later consultation on 1.8.16... records “no better from injection, dc [discharge] letter not helpful – says helpful therefore discharge, mindful that nothing much has helped now... [8.3 - 8.4]

[Mrs R] has undertaken appropriate medical treatment including physiotherapy, multiple medications in terms of type; sub-types and doses as well as significant intervention by pain management specialists in the form of epidural and sacro-iliac injections. [9.3]

... There is no record of non-compliance with treatment. [Mrs R] has complied with reasonable treatment for all conditions contributing to her incapacity – there is no record to the contrary... ” [10.2]

14. In February 2017, Mrs R appealed and provided further documents, including the above report.

15. In June 2017, NHS BSA responded under stage two of the IDRP. It quoted a new Medical Adviser who stated: -

“Dr Charlesworth-Jones opines that further treatment options have not been suggested by her specialists and are therefore not recommended or are not “relevant” or “meaningful”. He makes no comment that they are firmly recommended in recent [National Institute for Health and Care Excellence, “NICE”] guidance...

... [Mrs R] has been discharged from attendance, not because there is no treatment available, but because she reported that she had improved and there was no indication for further treatment. This is wholly contradictory to the information given to her GP. However the discharge letter states they are able to see and treat her again if requested by the GP...

There is little doubt that the indicated therapies are activity based, focused on improving negative thoughts and unhelpful coping strategies...

Dr. Charlesworth-Jones' report concludes that the pain management specialist advice has in some manner been "usurped". I do not think that this is consistent with the evidence. [Mrs R] has not been offered a functional pain programme in the context of that she reported that she had benefitted from an epidural injection and that the patient and her treating clinician therefore saw no need for further treatment...

Dr. Sinfield made the point that [Mrs R] has had psychological therapy in the past. This does not indicate that she does not have the capacity to benefit from a combined physical and psychological approach to address her back pain and low mood symptoms now, which are clearly linked... So long as both parties commit to achieving steady functional improvement then I consider this is likely to be of benefit sufficient to enable her to return to work to this role...

On balance of probabilities, [Mrs R] is likely to improve sufficiently to do this job if she is offered and she accepts a pain management programme. This is likely to be available to her and the need for this has been emphasised in the recently updated NICE guidance...

The Tier 2 condition cannot be met as the Tier 1 condition has not been met. Concluding Advice: My advice to the NHS Pensions is that on the balance of probabilities: Neither the NHS Pension Scheme Tier 1 nor the Tier 2 condition is met."

16. The NHS BSA decision-maker herself stated: -

"From my reading of the above, it is noted that the Medical Adviser considers that with the benefit of appropriate assessment and treatment, [Mrs N's] psychological and physical health could recover to the extent that she would be capable of carrying out the duties of her previous NHS employment before age 60. It is evident, with respect, from what I have read on [Mrs R's] complete medical record that Dr Charlesworth-Jones' medical opinion regarding her medical conditions may contradict other medical evidence, and the medical adviser has evidenced this in their rationale...

I note that the medical adviser, when considering NICE guidelines, considers that a combined physical and psychological approach to address [Mrs R's] debilitating symptoms would be reasonable and more likely than not would be effective in easing her current incapacity. The Medical Adviser recommends that there is scope for improvement before age 60 and I accept their findings."

17. In July 2017, Dr Sinfield provided a further letter. She stated: -

"[Mrs R] has suffered from chronic lower back pain now for three years and seeing a decline in her function I find it extremely unlikely that she is able to return to work as a nursing assistant.

... you have issues that [Mrs R] not responded or not tried every therapy that might be considered appropriate. I would comment that [Mrs S] has attended and engaged with every treatment that I have suggested that we try. Specifically that has included psychological therapy, physiotherapy, pain clinics, medical treatment of her depression and acupuncture. To spite [sic] having all these she has unfortunately not responded to any of them.

I note that you suggest that [Mrs R] be referred to a pain management programme. Unfortunately locally I do not have access to a pain management programme hence why I organized all the individual constituent elements of such. This has included as mentioned psychological therapy, physiotherapy, acupuncture, psychological therapies [sic] and medical treatment of her depressions [sic]. I strongly feel that even if a pain management were to be available in our area since she has tried all the constituent elements of this I cannot see how this would improve her situation.

My last comment would be over her previous epidural injections that she had for the lower back pain. I note that in your letter that there is some confusion about whether or not these were helpful. In summary, initially after the injection [Mrs R] found herself to be in a lot more pain and although this subsequently improved a little bit actually all that happened was she ended up back where she started in terms of her pain levels. It is not the case that the injections had a beneficial effect on the back pain overall. The discharge letter was not helpful in that it did not detail this specifically."

18. In September 2017, dissatisfied with NHS BSA's responses, Mrs R referred her complaint to this Office.

Adjudicator's Opinion

19. Mrs R's complaint was considered by one of our Adjudicators who concluded further action was required by NHS BSA. The Adjudicator's findings are summarised briefly below: -
- NHS BSA's main reason for declining Mrs R's application was that, with appropriate treatment, she could return to her previous NHS role.
 - But there were no treatments Mrs R had not tried, and none of the tried treatments had resulted in an improvement in her pain symptoms.
 - NHS BSA had stated "[Mrs R] has not been offered a functional pain programme in the context that she reported that she had benefitted from an epidural injection and that the patient and her treating clinician therefore saw no need for further treatment".
 - But there was documentary evidence from GP records that Mrs R had not benefitted from injections. So, the rationale for a functional pain programme was partly flawed.

- Despite NHS BSA's claim, at stage two of the IDRP, that Mrs R had not responded to or tried every therapy that might be considered appropriate, Dr Sinfield said that Mrs R had in fact engaged with every treatment suggested. And Dr Charlesworth-Moore said there was no evidence of non-compliance with any suggested treatments.
 - Dr Sinfield also said Mrs R had engaged with psychological therapy, physiotherapy, pain clinics and medical treatment of her depression. But none of these had provided any benefit.
 - NHS BSA's rationale for rejecting Mrs R's claim was that, if she completed a combined pain management programme, she would on balance experience enough improvement before normal retirement age to be able to return to her role.
 - However, this rationale was flawed as the individual elements of such a programme had been tried to no effect; in any case, no such programme was available to Mrs R.
 - It was for NHS BSA to show that a combined approach would, on balance, allow Mrs R to return to work, in circumstances where all the elements of such a programme had been tried but had provided no benefit, and where a medical expert strongly considered that a combined approach would not improve Mrs R's condition.
20. Mrs R's representative accepted the Adjudicator's Opinion and provided no further comments. NHS BSA did not accept the Opinion and the complaint was passed to me to consider. NHS BSA provided its 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 NHS BSA for completeness.

Ombudsman's decision

21. NHS BSA disagreed with the Adjudicator's Opinion and the main reason for this was as follows. The Scheme's IRMP, at stage two of the IDRP, said it was their expert medical opinion that the current NICE guidelines recommended a combined psychological / physical and return to work programme. If Mrs R underwent this type of treatment, the IRMP said, Mrs R would on balance be able to return to work; NHS BSA accepted that opinion. The IRMP also acknowledged Mrs R had psychological therapy in the past, but said that did not mean she would not benefit from a combined approach now.
22. NHS BSA has also said it believes the Adjudicator has come to a decision of his own, rather than reviewing the decision-making process, because he said there were no treatments Mrs R had not tried. NHS BSA said it was entitled to accept the advice of the Scheme's medical adviser, which was in turn based on the evidence available at the time of Mrs R's application.
23. In reviewing the decision-making process, I agree with the Adjudicator that an incorrect process has been followed in this case. This is because NHS BSA has accepted the advice of the Scheme medical adviser without sufficiently questioning it.

Specifically, it is clear from the stage two decision that the IRMP was aware that Mrs R had had psychological therapy in the past but did not benefit from it. However, the IRMP said only that this did not mean Mrs N could not benefit from a combined physical/psychological approach now; the IRMP did not say why that was, or explain the rationale of the NICE guidelines and whether it also applied where someone had undergone all the treatments provided in the combined approach.

24. I find that NHS BSA could potentially accept the IRMP's advice in this case. But only if the advice explained, or if NHS BSA itself explained, why on balance a combined physical / psychological programme would be successful in circumstances where the individual treatments have already been shown to be ineffective.
25. There is evidence, from Mrs R's GP, that a combined pain management programme is not actually available to Mrs R. This was provided in July 2017; that is, after stage two IDR. There is insufficient evidence that NHS BSA knew it was unavailable at the time it was considering Mrs R's complaint under the IDR. So, I do not find that NHS BSA has made an administrative error by basing its decision on the potential efficacy of a treatment that is not actually available. But I find that NHS BSA should take this into consideration. E2A(18) of the Regulations excludes from the definition of "appropriate treatment", any treatment 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".
26. However, as explained above, NHS BSA needs to explain why the suggested course of treatment would on balance be successful if carried out concurrently, when there is medical evidence demonstrating that it has already been shown to be unsuccessful when carried out sequentially.
27. Therefore, I uphold Mrs R's complaint.

Directions

28. Within 28 days of the date of this Determination, NHS BSA shall re-consider its decision not to award Mrs R Tier 2 or Tier 1 Ill Health Retirement benefits.

Anthony Arter

Pensions Ombudsman
5 June 2018

Appendix

E2A III health pension on early retirement

(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.

(3) Subject to paragraph (4), the pension to which a member is entitled-

- (a) upon satisfaction of the tier 1 condition ("the tier 1 pension"), or
- (b) upon satisfaction of the tier 2 condition in addition to meeting the tier 1 condition ("the tier 2 pension"), will be calculated as described in regulation E1.

(4) Subject to paragraphs (5) and (6), if the member meets the tier 2 condition in addition to meeting the tier 1 condition, the pensionable service on which the pension is based will be increased by two-thirds of the pensionable service the member could have completed had he stayed in pensionable employment until normal benefit age.

(5) If the member's employment is terminated on or before 31st March 2016, the minimum amount by which the member's pensionable service will be increased under paragraph (4) will be the lesser of-

- (a) 4 years pensionable service; and
- (b) the pensionable service the member could have completed if the member had stayed in pensionable employment until normal benefit age.

(6) To the extent that any increase under paragraph (4) or (5) would cause a member's pensionable service to exceed the limit provided for in regulation C2(3) (meaning of pensionable service), the amount of any excess will be reduced accordingly.

(7) Subject to paragraph (8), where a member becomes entitled to a pension by virtue of meeting the tier 2 condition, the Secretary of State may discharge her liability for that pension by the payment of a lump sum of an amount consistent-

(a) with the contracting-out and preservation requirements of the 1993 Act; and

(b) the lump sum rule.

(8) A lump sum payment under paragraph (7) may be made only if the Secretary of State is satisfied that it is appropriate in all the circumstances having regard to the life expectancy of the member.

(9) For the purpose of paragraph (8), the Secretary of State may require whatever medical evidence that the Secretary of State considers necessary.

(10) The amount of the lump sum payable under paragraph (7)-

(a) will be equal to 5 times the yearly rate of the member's pension (calculated in accordance with this regulation); and

(b) shall be payable in addition to the lump sum on retirement payable under regulation E6 (which shall not be subject to any reduction under regulation E6(3)) and the lump sum in place of part of the pension payable under regulation E7.

(11) The employment of a member to whom a pension is payable under this regulation may be pensionable under this Section of the scheme if he is under age 50-

(a) on the date the member returns to NHS employment if the member became entitled to receive a pension under a tier 1 condition on the day the member retired from pensionable employment; or

(b) on the day after the protection period in regulation E2C(6)(b) ends if-

(i) the member became entitled to receive a pension under a tier 2 condition on the day the member retired from pensionable employment, and

(ii) the Secretary of State did not discharge her liability for that pension by the payment of a lump sum in accordance with paragraph (7) of this regulation;
or

(c) on the day after the protection period in regulation E2C(6)(b) ends-

(i) the member became entitled to receive a pension under a tier 2 condition in place of a pension under a tier 1 condition on the date of the Secretary of State's determination under regulation E2B, and

(ii) the Secretary of State did not discharge her liability for that pension by the payment of a lump sum in accordance with paragraph (7) of this regulation.

(12) For the purposes of calculating the amount of the lump sum payable under paragraph (10), the member will be treated as if the member had made an election under regulation E7 to receive the maximum amount of a further lump sum payable under that regulation.

(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) in the case of a non-GP provider, such employment as the Secretary of State considers would involve a similar level of engagement to the member's current pensionable service as a non-GP provider; and

(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.