

Ombudsman's Determination

Applicant	Mr N
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Pensions

Outcome

1. Mr N's complaint is upheld and to put matters right NHS Pensions shall review its decision on Mr N's application for early payment of his deferred benefits (**EPDB**) under regulation L1(3)(b). It shall also pay Mr N £500 for distress and inconvenience.

Complaint summary

2. Mr N's complaint is that his application for EPDB on the grounds of ill health has not been considered properly.

Background information, including submissions from the parties

3. Mr N was employed as a full-time theatre orderly. He left the NHS in 2000. Mr N's normal pension age (**NPA**) is 60.
4. In January 2017 Mr N applied for EPDB on the grounds of ill health – chronic depression and anxiety. He was then age 56.
5. Mr N completed part 1 of form AW240, which is intended for deferred members of the Scheme to apply for the early payment of benefits. Under 'Consultant details' Mr N entered "NONE". Dr Kumar (GP) completed part 2 as Mr N's attending Doctor. Dr Kumar said:-
 - On prognosis to NPA:

"Continues to remain depressed. Prognosis – not so good."
 - In summary:

"patient remains depressed despite being on medication."

The outlook is that this gentleman will remain depressed in the foreseeable future.”

6. Dr Kumar ticked the ‘Yes’ box in answer to the question ‘Has the applicant seen a consultant or specialist about their present complaint?’ and provided the Psychiatrist’s name and address.

7. At the time of Mr N’s application regulation L1(3) of the NHS Pension Scheme Regulations 1995 (the **1995 Regulations**) provided:

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

...

(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 ; ...”

8. Mr N’s case was reviewed and declined by NHS Pension’s medical adviser (**MA**) on the basis that he had not demonstrated permanent incapacity for regular employment of like duration to his former NHS employment:

“The evidence submitted indicates that the applicant has had depression since 2012 for which he has been treated with one medication (citalopram). There is no indication from his GP that he has received any alternative medications, talking therapy or psychological support. He exhibits anhedonia. The GP does not comment on his fitness for work but indicates that he tends to stay at home and that the prognosis is for his depression and anxiety to continue, to some extent.

The applicant indicates that he worked in a self-employed capacity for over 14 years. He states that the reason his job ended was that the contractor and contract ended, in about 2011.

It is considered that the evidence points to current psychological incapacity for work which should respond well to psychological therapies such as cognitive behavioural therapy and changes to his anti-depressant therapy. Involvement of a psychiatric specialist service is likely to be of help as he appears to have become avoidant of social contract.

It cannot be said that he is permanently unfit for full time work as he is likely to improve with treatment as long as he engages with this.”

9. In July 2017 Mr N invoked the Scheme’s two-stage internal dispute resolution (**IDR**) procedure. At IDR stage one Mr N said:-

- He had been ill for a very long-time suffering with severe depression, low mood and anxiety.
 - He had tried tirelessly to look for work, but because of his medical disability he had struggled in all areas of his life.
 - He currently took his medication on a regular basis and his GP tried to help him.
 - He was medically not fit for work and had little to no money on a weekly basis.
10. Mr N submitted with his application GP Statements of Fitness for Work for 2013 and 2014 (low mood, anxiety and depression) and 2015 (low mood) and a letter dated 30 May 2017 pertaining to deductions from his Jobseeker's Allowance.
11. NHS Pensions obtained the opinion of another MA that Mr N was not permanently incapable of carrying out regular employment of like duration to his former NHS employment. The MA said:

"Forms Med 3 indicate that his GP has certified him not fit for work because of low mood and depression in 2013, 2014 and 2015. The evidence indicates that he is currently in receipt of jobseekers allowance.

In the initial application form the applicant indicates that he finished his NHS job. As a theatre orderly in 2000 for personal reasons. He stated [he] had been self-employed, as a shop fitter/subcontractor, for over 14 years before he became unwell. He finished his most recent job in 2011 because the contract ended hence there was no work. He states he has seen no consultants or specialists.

In the initial application, and part 2 of form AW240, his GP Dr Kumar states (11 January 2017), that he has chronic depression and anxiety (onset October 2012). He is still very depressed on medication. Most days he resides at home, he has very low mood and he has not much interest in doing things. His treatment is C...daily and z...daily. The prognosis is that he will continue to remain depressed for the foreseeable future. The prognosis is not so good.

Dr Kumar's opinion is noted.

Reasonable treatment in this case would very likely include:

- Medications from different classes (adequate dosage and a happy combination)
- Psychological therapy
- Behavioural therapy
- Lifestyle measures such as exercise and engaging in pastimes and social activities
- Specialist/specialist services involvement for any refractory and incapacitating symptoms.

On balance, it is considered that this applicant is more likely than not to be clinically capable of and resilient to full-time regular employment, within the four-year period to his normal benefit age, especially given compliance with reasonable treatment.”

12. After accepting the opinion of its MA, NHS Pensions turned down Mr N’s IDR stage one appeal in late September 2017.
13. On 27 November 2017 Dr Hamdy (GP) wrote a letter supporting Mr N for Employment and Support Allowance (**ESA**). Dr Hamdy said Mr N suffered from depression and anxiety and chronic leg pain. She said Mr N was dyslexic and was unable to read or write. She said Mr N’s depression and anxiety were getting worse to the point that he was sometimes suicidal.
14. In February 2018 Mr N provided a copy of a handwritten letter to the ‘Pension Scheme’ dated 16 December 2017 requesting that his complaint be considered under the Scheme’s IDR procedure. This is presumed to be Mr N’s IDR stage 2 appeal. The letter is not signed. In the letter Mr N says:-
 - If his letter is not strong enough he is able to get another doctor’s letter that highlights his mental capacity and the current state of his condition.
 - He also has the support of his local job centre. It has tried to find him work and help him become employable but without success.
 - He is struggling in all areas of life with his health
15. NHS Pensions says it did not receive Mr N’s letter at the time.
16. After contacting us, Mr N wrote to NHS Pensions requesting that it consider his complaint at IDR stage two. His appeal was time-out as it had been received more than six months after the IDR stage one decision.

NHS Pensions’ position

17. NHS Pensions says:-
 - It declined Mr N’s application because it is not considered that he is permanently incapable of engaging in regular employment of like duration. Its decision has been maintained throughout the process.
 - It has taken advice from a proper source; namely, the Scheme’s MAs. 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.
 - Its MA’s 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.

Adjudicator's Opinion

18. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by NHS Pensions. The Adjudicator's findings are summarised briefly below:-

- For Mr N to have received benefits under regulation L1(3)(b), NHS Pensions had to have been of the opinion that he was permanently, that is to age 60, prevented by ill health from being capable of regular employment of like duration to his NHS employment. Such employment does not have to be available or offered to Mr N, he just has to be capable of doing it.
- So far as their medical opinions are concerned, NHS Pensions' MAs are not within the Ombudsman's jurisdiction. They are answerable to their own professional bodies and the General Medical Council. However, if there had been an error or omission of fact on the part of the MA, NHS Pensions, as the ultimate decision-maker, would be expected to seek clarification. It is, therefore, appropriate to review the reports provided by its MAs.
- The MAs' opinions pertain to Mr N's health at the time of his application for EPDB in January 2017. It is clear, from their reports, that the MAs were aware of the eligibility criterion set out in regulation L1(3)(b). There is nothing to suggest that the MAs misinterpreted the regulation. They were also aware of the number of years remaining to Mr N's NPA. Their reason for recommending that Mr N's application be declined was that the medical evidence did not indicate that he was permanently incapable of undertaking other employment of like duration to his former NHS employment.
- The first MA said there was no indication from Mr N's GP that he had received alternative medications, talking therapy or psychological support. However, form AW240 only requested the GP to provide details on current and proposed treatment.
- Under Part 2 of the form Dr Kumar provided the name and address of a psychiatrist that Mr N had seen. Neither Dr Kumar nor the psychiatrist appeared to have been contacted for further details.
- The MA said Mr N should respond well to psychological therapies such as cognitive therapy and changes to anti-depressant therapy. It is not clear from his/her report on what basis the MA made this prognosis.
- Similarly, the second MA said Mr N stated that he had seen no consultants or specialists. That appeared to be referring to Mr N's entry of 'NONE' under

'Consultant details' in Part 1 of AW240. Again, this conflicted with Dr Kumar's completion of Part 2 of the form.

- The second MA listed what he/she considered reasonable treatments for Mr N's condition which, within the four-year period remaining to Mr N's NPA, were likely to enable Mr N to be capable of full-time regular employment. But as Dr Kumar and Mr N's psychiatrist were not contacted it is not clear if any of these treatments had been previously tried or were considered unsuitable or unlikely to be of benefit in treating Mr N's particular condition.
- The MAs had insufficient evidence on which to reach the conclusions they did. This was not subsequently addressed at IDR stage one.
- For these reasons NHS Pensions' decision had not been properly made.

19. NHS Pensions did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHS Pensions has provided 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 Pensions for completeness.

Ombudsman's decision

20. NHS Pensions' says:-

- It is for the member to initially submit relevant medical evidence in support of their application. The Scheme's MA will only obtain further medical evidence from the member's treating doctors if they deem it necessary. The MA is not required to seek further medical evidence. In Mr N's case, both MAs were able to reach a conclusion and opinion based on the evidence presented. They reached this conclusion on the balance of probabilities and based on expert clinical understanding and knowledge of the condition.
- The Scheme's MAs considered appropriate medical treatment available to Mr N that will be of benefit to allow a return to regular employment of like duration to his NHS employment in the years up to age 60.
- Mr N has had opportunities to provide further medical evidence. Having reviewed the documentation presented he has not referenced attending a Consultant.

21. Regulation T1(2) of the 1995 Regulations says the applicant must provide evidence of entitlement as required from time to time by the Secretary of State. It does not say the applicant must provide the evidence with the application. T1(2) also says that the applicant shall provide authority for a third party to release evidence, which suggests a more proactive approach by the MAs (acting on behalf of the Secretary of State).

22. The second MA said Mr N had not seen a consultant or specialist. But, on form AW240, Mr N's GP provided the name and contact details of a psychiatrist that Mr N had seen. Neither Dr Kumar nor the psychiatrist was contacted.

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23. The first MA said Mr N should respond well to psychological therapies such as cognitive therapy and changes to anti-depressant therapy. But the MA did not explain why, and NHS Pensions did not ask.
24. The second MA listed what he/she considered reasonable treatments for Mr N's condition. But, as neither Dr Kumar nor Mr N's psychiatrist were contacted, it is not clear if any of the suggested treatments had been previously tried, or were considered unsuitable, or unlikely to be of benefit in treating Mr N's condition.
25. NHS Pensions should have sought clarification before relying on the MAs recommendations, and therefore its decision was not reached in a proper manner. This amounts to maladministration by NHS Pensions.
26. This matter has caused Mr N significant distress and inconvenience and he now faces a further period of uncertainty while awaiting NHS Pensions' fresh decision. My view is that a payment of £500 is merited.
27. Therefore, I uphold Mr N's complaint.

Directions

28. To put matters right NHS Pensions shall:-

- Within 14 days of the date of this Determination request details from Dr Kumar and Mr N's psychiatrist of the treatments he has received and the psychiatrist's prognosis on Mr N's mental health condition.
- Within 14 days of receiving requested details/comments from Dr Kumar and Mr N's psychiatrist ask the Scheme's MA for a further assessment of whether Mr N is eligible for EPDB on grounds of ill health.
- Within 28 days of receiving the Scheme's MA's opinion issue its decision to Mr E with reasons.
- Within 14 days of the date of this Determination pay Mr N £500 for distress and inconvenience caused.

Karen Johnston

Deputy Pensions Ombudsman
4 December 2019