

## Ombudsman's Determination

Applicant	Miss N
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHS BSA</b> )

## Outcome

1. I do not uphold Miss N'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. Miss N's complaint concerns NHS BSA's decision not to award her an ill health retirement pension (**IHRP**).

## Background information, including submissions from the parties

4. Regulation L1(3)(b), of the Scheme's Regulations 1995 (SI 1995/300), applies to Miss N's ill health pension application. It states that:

“(3) 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...”
5. Miss N worked for the NHS as a part-time Staff Nurse until 2001 and last contributed to the Scheme in May 2002. She then worked at Nuffield Hospital from 2002 until 2004, when her employment terminated due to ill health. She has suffered from incisional hernia, diabetes and has a permanent tracheostomy and other conditions.
6. In September 2017, at age 54, Miss N applied for an IHRP from deferred status. In the application form, Miss N did not provide consent for NHS BSA to obtain further medical reports. She provided medical reports in relation to her medical negligence case.

7. On 4 October 2017, NHS BSA sent Miss N a decision letter declining her application by explaining that its Medical Adviser (**MA**) said:

“The occupational therapist describes significant difficulties with activities of daily living, adaptations planned for the home and aids required. The applicant reported having applied for part-time job, successfully, but being unable to sustain it because of fatigue and having to lift people...The evidence is insufficient to reach a conclusion, on balance, that this applicant is incapable of whole time, regular employment and likely to remain so for the 6 years to her normal benefit age. This is specifically if such employment is sedentary and not physically demanding; for example, desk-based work, using display screen equipment.”

8. Unhappy with the outcome, Miss N appealed NHS BSA’s decision by invoking the Scheme’s two-stage internal dispute resolution procedure (**IDRP**). In her appeal, Miss N did not provide any further evidence but provided further comments. She referred to her health having deteriorated over the last 10 years, she could not sit or walk for long periods of time and was in need of a scooter and a wheelchair. Miss N said her last job for a short period of time in 2009 was at a nursing home, but she had to leave as the job was too demanding. Miss N also said that she was in receipt of Employment & Support Allowance and Disability Allowance.

9. On 14 December 2017, NHS BSA sent Miss N a response under Stage one of the IDRP that upheld its previous decision and concluded:

“Although most of evidence presented has been related to who was to blame for what, there are a few allusions to prognosis. Mr de Beaux gives an opinion that the member will be permanently unfit for nursing. Mr Parker reports...” I consider that on the balance of probabilities she would have been able to continue in full time work to age 60” (in relation to her respiratory problems not other problems). Professor Schofield’s reports include the comments...”in the future Miss N might be able to undertake a sedentary role” and mentions “an administrative role” ...but advises that “she really could do with losing a considerable amount of weight.” However, Professor Barnes in his report...concludes that it is his opinion “I don’t think she would ever be fit enough to return to work” ...it is unclear...whether he is referring to nursing duties or to all work. Of the opinions presented..., only one...is that Miss N is likely to be permanent [sic] unfit for work, but what kind of work this relates to is not clarified. All the other opinions...indicate that Miss N should be able to perform full time clerical work and therefore this means the criteria...is not supported by the evidence.”

10. In March 2018, Miss N brought her complaint to us.
11. Miss N further appealed under Stage two of the IDRP. She provided consent for NHS BSA to obtain a report from her GP, Dr Spencer. The report was issued on 25 July 2018 and said:

“I have not met Miss N in the time since the 18.9.17...Miss N has not had any sick notes during this time and mentioned the possibility of looking for work in Lanzarote to a Practice Nurse on the 20.10.17, so I am unclear about her incapacity levels or timescale...Other than her usual practice nurse monitoring and usual recall plan, I cannot see any other interventions within the surgery...As with all these chronic conditions I do not think significant functional improvement is expected. Miss N fractured her right little finger and had a splint applied after manipulation.”

12. Miss N also provided other reports dated February and May 2018.
13. On 13 August 2018, NHS BSA sent Miss N a response under Stage two of the IDRP that upheld its previous decision. It referred to the fact that some reports provided by Miss N post-dated her original application therefore could not have been considered. However, certain aspects of them related to her health condition in relation to her circumstances at the time of her original application. It concluded:

“There is no doubt that Miss N had a physical infirmity at the time of the original application...Miss N also has other medical conditions...There is no indication that any of these were causing incapacity for work with the possible exception of left arm pain for which Miss N had been referred to the musculoskeletal services...Miss N had completed treatment and achieved her treatment goals...Dr Spencer’s response was that she was unclear as to Miss N’s incapacity levels at the time. In the absence of any direct evidence as to whether, at the time of the original application, Miss N’s medical problems gave rise to incapacity sufficient to prevent her from working for 10 hours a week in an appropriate role...”

14. In October 2018, NHS BSA sent us a formal response that said:

“Miss N’s application has been considered 3 times in total. ...In matters medical, decisions are seldom black or white. A range of opinions may be given from various sources, all of which must be considered and weighed. However, the fact that Miss N does not agree with the conclusions drawn and the weight attached to various pieces of evidence does not mean that any conclusion is necessarily flawed.”

## **Adjudicator’s Opinion**

15. Miss N’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 below: -
  - Under Regulation L1(3)(b), to be eligible for an ill health pension, Miss N must be deemed permanently (that is to age 60) incapable of engaging in regular employment of like duration.

- NHS BSA needed to consider Miss N's IHRP application in line with the Scheme's Regulations, review all the relevant medical evidence and properly explain its decision. The Adjudicator was of the view that NHS BSA has done that. It is for NHS BSA in consultation with its MA to attach weight (if any) to particular evidence.
  - The Scheme's MA was of the opinion that Mrs N was not permanently incapacitated from regular employment of like duration because there is not enough evidence to support her permanent incapacity.
  - A difference of medical opinion between the MA and Miss N's specialist, Mr DeBeaux as to her capacity for work before age 60, is not sufficient for the Ombudsman to say that NHS BSA's decision to accept the opinion of its MA was flawed.
  - The Adjudicator appreciated that Miss N does not consider NHS BSA's decision to be satisfactory, but its decision appears to have been properly made. Consequently, in the Adjudicator's opinion, there are no grounds for the Ombudsman to remit the matter back to NHS BSA.
  - It was therefore the Adjudicator's opinion that this complaint should not be upheld.
16. Miss N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss N 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 Miss N for completeness.
17. Miss N made an assertion that she cannot work and that her health condition will never improve as confirmed by her GP. She also said that the MA should have assessed her in person.

### **Ombudsman's decision**

18. My role in this matter is not to decide whether Miss N is entitled to an IHRP - that is for NHS BSA to decide in consultation with its MA. Also, it is not for me to agree or disagree with any medical opinion.
19. My role is to decide whether NHS BSA has correctly applied the Scheme's Regulations, considered all the relevant evidence and made a decision which is not flawed. By flawed, I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.
20. I can see no evidence that NHS BSA has not followed the correct processes and has not considered the IHRP in line with the Regulations and the medical evidence available.

21. NHS BSA is required to consider the prognosis of an applicant for an IHRP as at the date of application. This requires a forward-looking assessment on the balance of probabilities based on the evidence then available. NHS BSA are also required to consider any additional evidence which may be submitted during IDRPs that speaks to the condition as at the date of application. I consider that this is what has occurred in this case. I have great sympathy for Miss N's situation however the fact that she disagrees with the NHS BSA's decision is not sufficient for me to remit her case back to it for reconsideration.
22. I find that NHS BSA has considered all Miss N's relevant medical evidence and I have seen no evidence of NHS BSA being selective in the information it had used in its decision making process. NHS BSA abided by the Scheme's Regulations and I find no reason to remit her case back to NHS BSA for reconsideration.
23. Therefore, I do not uphold Miss N's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
29 May 2019