

Ombudsman's Determination

Applicant	Dr R
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Dr R's complaint and no further action is required by NHS BSA.

Complaint summary

2. Dr R has complained about NHS BSA's decision to award Band 5 Permanent Injury Benefits (**PIB**) from 1 January 2005 rather than from the day after her last day of NHS employment, 1 April 1996.

Background information, including submissions from the parties

3. The sequence of events is not in dispute. I set out the key points below. I have not written out every detail, but I have covered the main points.
4. The Scheme provides PIB for members who suffer permanent loss of earning ability (**PLOEA**) in excess of 10% as a result of an injury sustained or disease contracted which is wholly or mainly attributable to their NHS employment. 'Permanent' in this context means to normal retirement age of 65.
5. On 6 March 1996, Dr R was dismissed from employment with immediate effect for gross personal misconduct.
6. On 28 October 2002, Dr R applied for PIB.
7. In August 2003, Dr R's application for PIB was processed up to the PLOEA assessment stage and it was concluded that she had suffered a PLOEA of 30% (Band 3). However, this decision was not conveyed to Dr R because the application was declined by administrators on grounds that she did not meet the requirements of Regulation 3(3) of the NHS Injury Benefits Regulations 1995.

Regulation 3(3) states:

“Persons to whom the regulations apply

(3) These Regulations shall not apply to a person—

(a) in relation to any injury or disease wholly or mainly due to, or seriously aggravated by, his own culpable negligence or misconduct”

8. On 6 October 2011, NHS BSA awarded Dr R entitlement to PIB under Regulation 4(3) of the NHS Injury Benefits Regulations 1995 (as amended) having assessed her PLOEA by reason of the injury to be 30% (Band 3) in accordance with Regulation 4, backdated to 1 April 1996.

Regulation 4(3) states:

“Persons to whom the regulation 3(1) apply

(a) ceases to be employed before 31st March 2018 other than by reason of the injury or disease,

(b) at the date of ceasing that employment has not attained normal benefit age,

(c) having ceased that employment, suffers a permanent reduction in earning ability by reason of that injury or disease, and

(d) has not been paid, other than under paragraph (5) or (5A), any allowance or lump sum under these Regulations in consequence of that injury or disease.”

9. On 4 January 2012, NHS BSA agreed to revisit the assessment of Dr R’s PLOEA based on all the medical evidence available to date.
10. On 23 February 2012, NHS BSA confirmed to Dr R that Band 3 remained appropriate.
11. On 28 February 2012, Dr R contacted NHS BSA stating that she believed that the original Band 3 assessment was incorrect and enquired as to what information was required in order to challenge the assessment. NHS BSA told her that it would need medical evidence to demonstrate her PLOEA at 31 March 1996.
12. On 8 May 2012, Dr R confirmed that she did not have any further medical evidence in support of her application as she had already submitted everything previously.
13. On 7 April 2014, Dr R appealed the decision made by NHS BSA. Her appeal was dealt with by NHS BSA under Stage 1 of the Scheme’s internal dispute resolution procedure (**IDRP**).
14. NHS BSA referred the matter to a new Medical Advisor (**MA**) who considered the following evidence: -
- report from Dr Turner dated 22 April 2005;
 - report from Dr Isaac, Psychiatrist, dated 14 October 2004;

- report from Dr Benaim, Consultant Psychiatrist, dated 15 February 1999;
 - report from Dr Hale, Consultant Psychiatrist, dated 15 February 1995; and
 - report from Dr Clarke, dated 8 November 1999.
15. The MA said that in the period up to the beginning of 2005 the medical evidence in particular the report from Dr Turner indicated that Dr R was coping, and it was not until early 2005 that there was a deterioration to her injury which had resulted in a further reduction in earning ability. The MA concluded that Dr R became permanently incapable of any work and therefore a Band 5 (maximum award) was appropriate from January 2005.
16. On 9 July 2014, NHS BSA issued its Stage one IDRPs response to Dr R. It said that it did not think Dr R had suffered a greater PLOEA from date of severance, therefore the Band 3 assessment remained appropriate from the last day of NHS service in 1996. However, following the Scheme's MA recommendation, it found that Dr R had suffered a further reduction in her earning ability by reason of injury from 1 January 2005.
17. On 27 February 2015, Dr R appealed under Stage 2 of the IDRPs. She said she would like the Band 5 assessment to be backdated to April 1996. NHS BSA referred the matter to a new MA, who considered the following evidence: -
- letters from Dr R dated 7 April 2014, 27 February 2015, and 1 March 2015;
 - a report from Dr Clarke, Consultant Psychiatrist, dated 8 November 1999;
 - a report from Dr Turner, Consultant Psychiatrist, dated 19 April 1999 and assessments in 1999 and 2005;
 - a report from Dr Issac, Consultant Physician, dated 14 October 2005;
 - an assessment in July 2003 from Dr Ringer, Disability Analyst, and
 - Dr R's witness statement dated April 2005.
18. The MA said that Dr R's psychological injury achieved a degree of improvement and partial remission between 1994 and 2005. The MA further commented that between 1996 and 2005 the evidence indicates that Dr R's injury was such that she would be capable of carrying out a less demanding role such as research or a medical writing role which would reflect a Band 3 award. However, the MA noted that Dr R's depressive illness relapsed in early 2005 when she had to write a full witness statement about work related events. At this time Dr R was age 63 and therefore it was considered unlikely that that in the time up to age 65 Dr R would return to any work. As such a Band 5 assessment was deemed appropriate from January 2005.
19. On 27 April 2015, NHS BSA issued its stage two response to Dr R. NHS BSA found that, based on the evidence and information available, it was able to conclude that as

a result of the accepted psychological injury the original assessment of Dr R's PLOEA from her last day of NHS employment remains appropriate and that the Band 5 assessment remains appropriate from 1 January 2005.

The Pension Ombudsman's Position on Ill Health Benefits

20. When someone complains that they have not been awarded the ill health (or incapacity) pension they think they should get, the Ombudsman looks at the way the decision has been reached.
21. The Ombudsman will not look at the medical evidence and make his own decision based on it, nor will he ask for more medical reports. The Ombudsman will consider whether the decision-maker has - (i) gone about making the decision in the right way; and (ii) made a decision that makes sense based on the evidence.
22. The Ombudsman does not have to agree with the decision. He will not intervene just because he thinks the decision-maker could have reached a different decision.
23. The Ombudsman will look at whether the decision-maker has followed the scheme's rules. Different pension arrangements have different rules about ill-health pensions. For example, sometimes the decision will be made by the employer, sometimes by the scheme's trustees or managers, or by a combination of all of them. The Ombudsman will look to see whether the right person has made the decision.
24. If the Ombudsman thinks the decision-maker has reached their decision in the wrong way he will usually order them to make the decision again in the proper way. For example, he may ask them to obtain more evidence.
25. The Ombudsman can also look at whether there was any maladministration, such as delay. If he finds maladministration, he may also award compensation for any non-financial injustice, such as distress or inconvenience.

Adjudicator's Opinion

26. Dr R'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:-
 - Members' entitlements to benefits when taking early retirement due to ill-health are determined by the scheme rules or regulations. The scheme rules or regulations determine the circumstances in which members are eligible for ill-health benefits, the conditions which they must satisfy, and the way in which decisions about ill-health benefits must be taken.
 - In this case, the relevant regulations are NHS Injury Benefits Regulations 1995.

Regulation 4 provides:

(2) Where a person to whom regulation 3(1) applies ceases to be employed before 31st March 2018 as such a person by reason of the injury or disease and no allowance or lump sum, other than an allowance under paragraph (5) or (5A), has been paid under these Regulations in consequence of the injury or disease, there shall be payable, from the date of cessation of employment, an annual allowance of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6) will provide an income of the percentage of his average remuneration shown in whichever column of the table hereunder is appropriate to his service in relation to the degree by which his earning ability is permanently reduced at the date that person ceases that employment.”

- One of the specific obligations on trustees and decision-makers acting for trustees is to consider all relevant information which is available to them and ignore all irrelevant information.
- Dr R asserts that she should be awarded Band 5 from April 1996 and not from 1 January 2005. She has said that Dr Turner’s report refers to relapses in 1999, 2000, 2001 and 2012. NHS BSA has said that it has properly considered Dr R’s application, taking into account all relevant medical evidence and nothing irrelevant. It is not the Ombudsman’s role to review the medical evidence and come to a decision of his own but to consider the decision-making process. In this particular case, looking at the whole process from the time Dr R challenged the first decision to award Band 5 from January 2005 to when NHS BSA issued its IDR stage two response, it was the Adjudicator’s opinion that NHS BSA considered all the relevant facts and followed the procedure correctly. Further, NHS BSA had considered Dr Y’s application numerous times and each time her case was referred to a different MA who had no previous involvement in the application. As such there are no justifiable grounds for her to say that NHS BSA decision was flawed or that the process undertaken to reach its decision was incorrect.
- Both MA’s were of the opinion that Dr R became permanently incapable of any work in January 2005 and it was at that point that a Band 5 was appropriate. They both said that Dr R’s conditions prior to January 2005 were such that she could undertake less demanding employment such as a research/medical writing role where she could use her skills, knowledge and experience.
- Dr R disagreed with both MA’s assessments and presented her counter arguments. She said the role of medical writer would not be seen as ‘less demanding’ than normal employment in her condition but equally impossible. The Adjudicator could not see any evidence to show that either MA failed to take into account Dr R’s concerns or conditions. Both reports took into account relevant evidence and referred to appropriate medical research. She appreciated that Dr R disagrees with the conclusions reached and presented her counter arguments,

however that was not reason for the Adjudicator to remit the matter back to NHS BSA for the application to be reconsidered.

- Dr R says that NHS BSA accepted the MA's advice rather than taking into account the full facts of her case. NHS BSA needed to consider Dr R's PIB application in line with the Scheme's Regulations and properly explain why her application either can or cannot be approved. The Adjudicator was satisfied that NHS BSA had complied with the Scheme's Regulations and that all relevant evidence has been considered. A difference of medical opinion between the MA's and Dr R's treating doctors is not sufficient for the Ombudsman to say that NHS BSA's decision to accept the opinion of the MA, who is an expert in occupational health, was flawed.

27. Dr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr R 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 Dr R for completeness.

Ombudsman's decision

28. Dr R maintains that NHS BSA should not have accepted the opinion of the MA at stage two of the IDR. She says the MA should not have taken into consideration Dr Ringer's report in July 2003, as it contained several inaccuracies. However, I do not find that there is sufficient evidence to support this. The opinion of the MA, and the subsequent decision at the second stage of the Scheme's appeal process, were thorough and set out why Dr R had not met the criteria for Band 5 from an earlier date.

29. The MA's opinion, and the medical evidence that he took into consideration at stage two of the appeal process, provided NHS BSA with a comprehensive opinion allowing it to reach a decision. There is no sign that it failed to review Dr R's concerns or condition properly. I appreciate that Dr R disagrees with NHS BSA's decision not to grant her Band 5 from an earlier date and Dr Tuner's report supports relapses. However, Dr R's disagreement is not a sufficient reason for me to remit the matter back to NHS BSA for her application to be reconsidered.

30. Dr R questions how the Ombudsman can determine that the decision made has considered all relevant evidence or not if it does not consider the medical evidence. To clarify, my role is limited to reviewing the medical evidence in order to ascertain whether it has been taken into account by the decision maker. It is not to review the medical evidence and come to a decision of my own as to whether Dr R's PIB should be backdated to an earlier date. I believe based on the evidence that has been presented, that NHS BSA has considered the relevant factors in arriving at its decision. I am satisfied that there was sufficient medical evidence for it to arrive at the decision which it did and I do not consider that there are justifiable grounds for me to find that the process NHS BSA undertook in reaching its decision was flawed.

31. Therefore, I do not uphold Dr R's complaint.

PO-21659

Karen Johnston

Deputy Pensions Ombudsman
21 May 2020