PO-21962

Ombudsman's Determination

Applicant	Miss R
Scheme	NHS Pension Scheme (**the Scheme**)
Respondent	NHS BSA

Outcome

1. I do not uphold Miss R'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 R's complaint against NHS BSA concerns its 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 R'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 R worked for the NHS as a part-time Staff Nurse. She has suffered from back pain since 2005 due to a prolapsed disc. Miss R's other health conditions are thyroid dysfunction, Type 2 diabetes and vertigo/labyrinthitis (an inner ear disorder) for which she has been provided with a hearing aid.

6. Miss R left her NHS employment on 31 August 2016.

7. In July 2017, at age 54, Miss R applied for an ill health pension from deferred status. In her application, Miss R provided an undated application form filled in by her GP, Dr

Qureshi who under "Present functional restrictions and disability" referred to Miss R's main health issue being back pain, sciatica and numbness of feet. Miss R also provided a report from Dr Qureshi, dated February 2017. Dr Qureshi said:

> "In my opinion, with the…ongoing persistent problems, the patient should not be able to work."

8. On 28 July 2017, NHS BSA sent Miss R a letter declining her application by explaining that its Medical Adviser (**MA**) said that:

> "Although these issues can result in occasional incapacity, from purely a medical point of view, it is expected that these conditions can remain under control with appropriate intervention. Therefore, these conditions on their own or in combination, are unlikely to lead to any permanent incapacity. It is my opinion that relevant medical evidence has been considered in this case and, on the balance of probabilities, indicates: That the applicant is not permanently incapable of carrying out regular employment of like duration."

9. Unhappy with the outcome, Miss R appealed NHS BSA's decision by invoking the Scheme's two-stage internal dispute resolution procedure (**IDRP**). In her appeal, Miss R provided further reports from her treating doctors.

10. On 24 January 2018, NHS BSA sent Miss R a response under stage one of the IDRP that upheld its previous decision and concluded that:

> "[Miss R]'s back pain is, most likely, related to degenerative disc disease as this was documented on imaging in 2005…There is no evidence of any specialist referral since 2011…She had high blood pressure…There is no evidence that [Miss R]'s high blood pressure was giving rise to any symptoms or incapacity for work at the time of the original application. [Miss R] has an underactive thyroid gland for which she was receiving thyroid hormone treatment…There is no indication that this was giving rise to any symptoms or incapacity for work. [Miss R] had type 2 diabetes. This is relatively recent onset…There is no evidence that [Miss R] had any complications from the diabetes at the time of the original application…On the assumption that it was either [Miss R]'s back problem or her ENT condition (or a combination of the two) that was giving rise to the incapacity reported by Dr Qureshi, the key consideration is whether, at the time of the original application, [Miss R]'s incapacity was likely to be permanent…Given that the benefits of such treatment would have been likely to have been realised over a timescale measurable in months, and given that, at the time of the original application, some 6 years remained before [Miss R] reached pension age, it is likely that the benefits of treatment would have been realised before [Miss R]'s pension age….the working diagnosis for [Miss R]'s ENT symptoms appears to have been Meniere's disease…the condition tends to spontaneously stabilise over time…her Meniere's disease would have been unlikely to have given rise to permanent incapacity."

11. Miss R appealed the IDRP stage one decision. In her appeal. Miss R said:

> "…I had labyrinthitis…I have tried several forms of medication from my GP with no improvement, I do daily exercise to help with my balance…My condition is I have numbness in both feet and ankles which can radiate up the legs depending on certain activities I perform, the pain is mostly controlled by daily exercise and analgesia as required…I had several episodes of sick leave from work…I would like to know, how long I have to have these conditions for them to be deemed as permanent, and when they are will I get my pension back dated?"

12. On 19 March 2018, NHS BSA sent Miss R a response under stage two of the IDRP that upheld its previous decision and said:

> "Regarding the ENT symptoms, Mr Owa [ENT surgeon] states on 19 July 2016 that "she is much better since she was last seen. I agree she seems to have made a spontaneous recovery from the labyrinthitis that she experienced 2 months ago. I have asked her to continue with vestibular rehabilitation exercises and I have not made specific arrangements to see her again…" The previous correspondence from Mr Al-Shammeri [associated specialist in ENT], dated 14 June 2016 indicated that it was thought she might have Meniere's disease and had been offered an intra-tympanic steroid injection but this had been declined, hence the review by Mr Owa subsequently. An audiogram had shown improvement in her hearing in higher frequencies. Whilst she has ongoing deafness and tinnitus…on the left with "a feeling of congestion around the ear" and a balance problem helped by daily exercises, there is no indication that these symptoms would permanently incapacitate someone from undertaking part time work at the current time…Again, there is no indication from the applicant that she is actually incapacitated from work at the current time because of these symptoms and her own account is that symptoms are mostly controlled."

13. In April 2018, Miss R brought her complaint to this Office.

14. On 21 June 2018, NHS BSA sent this Office a formal response that said:

> "Miss R'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 R] 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 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: -

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

    - NHS BSA needed to consider Miss R's IHRP application in line with the Scheme's Regulations, review all the relevant medical evidence and properly explain its decision. The Adjudicator was satisfied 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 Miss R was not permanently incapacitated from regular employment of like duration because her symptoms are mostly controlled.

    - A difference of medical opinion between the MA and Miss R's GP, 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 R does not consider NHS BSA's decision to be satisfactory, but its decision appears to have been properly made. Consequently, in the Adjudicators opinion, there were no grounds for the Ombudsman to remit the matter back to NHS BSA and Miss R's complaint was not upheld.

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

17. Miss R contends that NHS BSA has not reviewed her medical evidence properly and been selective in the information it had used.

18. Miss R says she has been unable to work since she left NHS employment and refers to her current health condition having deteriorated.

19. Miss R says that she has been awarded an ill health pension from a local government pension scheme with regard to a less demanding/ stressful role.

Ombudsman's decision

20. My role in this matter is not to decide whether Miss R 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.

21. 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.

22. 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.

23. 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. The fact that some years later it may appear that somebody has a different outcome to that which was expected is not itself proof that the original application was wrongly decided.

24. I find that NHS BSA has considered all Miss R'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 re-consideration.

25. Miss R refers to the fact that she has been awarded an ill health pension benefits from a local government pension scheme. However, these are awarded under different regulations, and each decision maker is bound to have regard to the medical evidence presented to it by its appointed medical adviser, so the two decisions are not directly comparable. As such I cannot find that the award of ill health pension benefits under another scheme means that NHS BSA's decision not to award an IHRP is flawed.

26. Therefore, I do not uphold Miss R's complaint.

Karen Johnston

Deputy Pensions Ombudsman
18 December 2018