PO-22815

Ombudsman's Determination

Applicant	Mr D
Scheme	NHS Pension Scheme (**the Scheme**)
Respondent	NHS Business Services Authority (**NHS BSA**)

Outcome

1. I do not uphold Mr D'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. Mr D's complaint is that he has been refused a Tier 2 ill health retirement pension (**IHRP**).

Background information, including submissions from the parties

4. Regulation 90 and 93 of 'The NHS Pension Scheme Regulation 2015' defines the Tier 1 condition as "permanently incapable of efficiently discharging the duties of that employment", meaning the member's NHS employment, and the Tier 2 condition as "permanently incapable of regular employment of like duration…in addition to meeting the Tier 1 condition".

5. Mr D was employed initially as a full time paramedic.

6. In 2014, Mr D was awarded a Tier 1 IHRP but his application was on put hold as he was able to continue working with modifications.

7. On 3 July 2017, it was confirmed from the Locality Manager that Mr D was redeployed to the 111 Service in line with Occupational Health (**OH**) advice.

8. On 10 July 2017, NHS BSA received Mr D's new application for an IHRP.

9. On 27 October 2017, NHS BSA instructed Medigold Health, the Scheme's Medical Advisers to provide an independent medical opinion in relation to Mr D's case. Mr D's application for an IHRP was considered against the job role of Clinical Adviser in the 111 Service. Mr D's initial application was declined on the grounds that the Scheme's medical advisor did not consider that Mr D was permanently incapable of efficiently

discharging the duties of his NHS employment. Based on the medical evidence present, Medigold Health concluded that Mr D's symptoms and capacity for work were more likely than not to improve either with time, or in response to future treatment, sufficient to allow a return to his NHS role in the time up to his normal benefit age of 67.

10. On 1 December 2017, Mr D appealed the decision made by NHS BSA. His appeal was dealt with by NHS BSA under stage 1 of the Scheme's internal dispute resolution procedure (**IDRP**).

11. On 23 March 2018, NHS BSA issued its stage 1 IDRP response to Mr D. NHS BSA had referred the matter to a new Medical advisor, who requested further medical evidence from Dr Mwambingu, Consultant Cardiologist. The Scheme's medical advisor was of the opinion that Mr D is likely to experience a positive response from his ongoing treatment, however he said that there is a likelihood that he would not respond well enough to allow him to return to a highly pressurised full time employment. He anticipated that Mr D's symptoms may well improve with further optimisation of medication as well as the implantation of the CRTD. He noted that symptomatic improvement from the device can vary from patient to patient and some patients may improve within days whereas in others it may take weeks or months.

12. The Scheme's medical advisor certified that, in his opinion, the Tier 1 condition was met but the Tier 2 condition was not met as it was not possible to conclude that Mr D was permanently incapable of other less demanding full time employment. The Scheme's medical advisor noted that Mr D had only recently started treatment for his heart condition and it may be possible that he would be continually significantly impaired by his conditions and this would become apparent within the next three years. He therefore recommended reassessment of the Tier 2 condition within three years from the date of the Tier 1 award. Based on this, NHS BSA upheld Mr D's appeal and granted Tier 1 however, it maintained that he does not meet requirement for a Tier 2 IHRP.

13. On 26 March 2018, Mr D appealed under stage 2 of the IDRP.

14. On 14 May 2018, NHS BSA issued its stage 2 IDRP response to Mr D. NHSBSA referred the matter to a new medical advisor. The new medical advisor considered all referral documents; a letter from Mr D dated 26 March 2018; documents submitted with the IDRP stage 1; a letter from Yorkshire Ambulance trust dated 3 July 2017; a letter from, PAM OH Solutions dated 19 July 2017; AW33E Part C; OH, report dated 7 July 2017; GP report dated 4 October 2017; a letter from department of clinical Haematology Pinderfields Hospital dated 17 March 2015; and a letter from Yorkshire Health Solutions dated 13 July 2017.

15. The new medical advisor said that in her opinion, although Mr D is significantly incapacitated, the most recent medical evidence from his treating cardiologist is that improvement in his symptoms are expected from the treatment in place or from modifications to those treatments. The specialist specifically states that consideration

of sedentary work is not unreasonable, albeit that not initially on a full time basis, and issues of significant and predictable stress would need to be addressed and minimised. She noted that the specialist also indicated that there were psychological barriers to consider, but there are psychological therapies that should improve Mr D's situation such that in the longer term it would not be unreasonable to consider that Mr D could undertake alternative gainful employment of a sedentary nature of lower, or risk assessed, levels of stress with appropriate psychological support and optimisation of his cardiological medical and implanted device. She added as such it would not be unreasonable to consider that Mr D would be capable of undertaking alternative regular employment of like duration, such as employment of a sedentary nature of lower or risk assessed levels of stress.

16. Based on the view of the new medical adviser NHS BSA held that, on the balance of probabilities, Mr D is not permanently incapable of regular employment of like duration and Tier 2 was not met.

Adjudicator's Opinion

17. Mr D'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: -

- The Ombudsman's role is not to decide whether Mr D is eligible for an IHRP; that is a matter for NHS BSA to decide after obtaining requisite certification from a Medical Advisor. It is also not for the Ombudsman to agree or disagree with any medical opinion.

- The Ombudsman's role is to decide whether NHS BSA has abided by the Regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. If there are flaws in the decision making process the Ombudsman can require NHS BSA to look at Mr D's case again. However, the weight which is attached to any of the evidence is for NHS BSA to decide, including giving some of it little or no weight. It is open to it to prefer the advice of its own medical advisers unless there is a cogent reason why it should not

- Mr D says Dr Gatenby, Consultant Cardiologist, Dr Dean, his GP, an occupational Therapist and heart failure specialist nurse's opinion seem to have been ignored and NHS BSA relied solely on Dr Mwambingu's report. However, there is a difference between ignoring evidence and considering evidence but attaching little or no weight to it. As such, the Adjudicator was satisfied that NHS BSA had properly considered all the relevant information.

- NHS BSA needed to consider Mr D's IHRP application in line with the Scheme's Regulations and properly explain why his application either can or cannot be approved. The Adjudicator was satisfied that NHS BSA complied with the

Scheme's Regulations and that all relevant evidence has been considered. A difference of medical opinion from Mr D's treating doctors, as to his permanent incapacity for work of like duration to his former NHS duties, is not sufficient for the Ombudsman to say that NHS BSA's decision to accept the opinion of the medical advisor, who are experts in occupational health, was perverse.

- Dr Mwambingu and the medical advisor at IDRP stage 2 were of the opinion that Mr D was not permanently incapable of discharging efficiently the duties of his employment by reason of ill health or infirmity of mind or body until age 67, and he is not likely to be capable of undertaking gainful employment before normal pension age. They both said that Mr D's conditions are unlikely to be permanent and with ongoing treatments including implantation of the CRTD, psychological therapy and medication, there is time for the benefits of such treatments to be realised before Mr D reaches pension age.

- Mr D disagreed with Dr Mwambingu's and the medical advisor at IDRP stage 2's assessment and reiterated that his GP supports his application. However, the Adjudicator was of the view, that this was not sufficient for the Ombudsman to say that NHS BSA's decision was flawed.

- Mr D says that there has been no change in his health and, as such, a Tier 1 award does not fairly reflect his current medical condition. However, NHS BSA have acknowledged Mr D had only recently started treatment for his heart condition and that he may be permanently significantly impaired by his conditions which would become apparent within the next three years. Therefore, NHS BSA have agreed to a reassessment to see if he meets the Tier 2 condition within a period of three years from the date of the Tier 1 award. As such it was the Adjudicator's view that NHS BSA's decision was satisfactory and reasonable.

18. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D provided his 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 Mr D for completeness.

Ombudsman's decision

19. Mr D maintains that Dr Mwambingu's report submitted to NHS BSA was inaccurate and misleading as he was not examined by him, and as such NHS BSA did not consider all relevant medical evidence. However, I do not find that there is sufficient evidence to support this assertion. The medical opinion of Dr Mwambingu and subsequent decision at the second stage of the Scheme's appeal process were sufficiently thorough and set out why Mr D had not met the criteria for a Tier 2 IHRP. Further, Dr Mwambingu stated in his report that as Mr D had only recently started treatment for his heart condition it is too early to say that he is permanently significantly impaired by his conditions. However, this would become apparent within the next three years and as such NHS BSA agreed to a reassessment at that point.

20. It is my view that Dr Mwambingu's report and the medical advisors report at stage 2 of the IDRP provided NHS BSA with a comprehensive opinion in order for it to reach a decision. I have not seen any evidence to show that it did not review any aspect of Mr D's concerns or condition properly. Dr Mwambingu's opinion took into account relevant medical evidence and referred to appropriate medical research. I appreciate that Mr D disagrees with NHS BSA's decision not to grant him Tier 2 IHRP. However, Mr D's disagreement is not a sufficient reason for me to remit the matter back to NHS BSA for his IHRP application to be reconsidered.

21. I find, based on the evidence that has been presented, that NHS BSA has considered the relevant factors in arriving at its decision not to grant Mr D an IHRP. 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. Therefore, I do not uphold Mr D's complaint.

Karen Johnston

Deputy Pensions Ombudsman
10 September 2018