

Ombudsman's Determination

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| Applicant | Miss S |
| Scheme | NHS Pension Scheme (the Scheme) |
| Respondent | NHS BSA |

Outcome

1. I do not uphold Miss 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 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. Miss S' ill health pension application is regulated by Regulation 90 of the Scheme's Regulations 2015 (SI 2015/94). It states that:

"An active member to whom this regulation applies who retires from pensionable employment before normal retirement age shall be entitled to a pension under this regulation if...the member's employment is terminated because of physical infirmity as a result of which the member is-

 - (i) permanently incapable of efficiently discharging the duties of that employment (the 'tier 1 condition'); or
 - (ii) permanently incapable of regular employment of like duration (the 'tier 2 condition') in addition to meeting the tier 1 condition."
5. Miss S worked part-time for the NHS as a Domestic Services Assistant. Miss S has been unable to work since September 2015 due to ill health. She has suffered from bilateral knee osteoarthritis for which she had a total right knee replacement in September 2015. Miss S also suffers from type 2 diabetes and left ventricular dysfunction.
6. In June 2016, Miss S applied for an IHRP.

7. On 27 June 2016, NHS BSA sent Miss S a letter declining her application by explaining that its Medical Adviser (**MA**) said:

“...it is stated that she requires a total left knee replacement but has been advised by the orthopaedic team that she will have to wait up to 12 months after the right knee replacement...It is accepted that [Mrs S] is currently unfit for work due to her left knee osteoarthritis. However, following a total knee replacement and an appropriate period of recovery and rehabilitation she would be expected to be capable of returning to her role...before her 67th birthday. [Miss S] is also stated to be suffering from type 2 diabetes and left ventricular dysfunction. Both these conditions are likely to be a result of, or exacerbated by, her weight issues (BMI 55)...It is considered likely that with appropriate treatment of her weight issues there would be significant improvement in her functional capacity...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 the NHS employment...That the applicant is not permanently incapable of regular employment of like duration...”

8. In June 2016, Miss S contacted the Pensions Advisory Service (**TPAS**) for assistance.
9. In August 2016, Miss S appealed against NHS BSA’s decision by invoking the Scheme’s two-stage internal dispute resolution procedure (**IDRP**).
10. It was not until May 2017 that NHS BSA sent Miss S a response under stage one of the IDRP. This was due to the delay in receiving comments from the MA. The letter said:

“The evidence indicates that her right knee surgery was successful and that further treatment is planned, in [sic] form of left total knee replacement, which should give benefit and, following appropriate period of recovery, allow her to return to her normal job demands. Her functional capacity should also improve due to weight reduction, preferably under dietitian, or if possible with help of bariatric procedures...It is therefore not accepted that Miss S is permanently incapable of her NHS work...Having very carefully considered the comments of the Medical Adviser, I can see no reason to disagree with their conclusion and, I therefore, endorse the view that you are not entitled to ill health retirement benefits from the NHS Pension Scheme.”

11. With TPAS’ assistance, Miss S further appealed against the stage one decision by submitting a report from her GP, Dr Patel, dated 8 September 2017 which said:

“She made a good recovery from this replacement. However, she developed a valgus deformity and antalgic gait and it looks as if she may need a revision replacement of the right knee in the near future. She is grossly obese and in spite of various medications and diets she has not managed to lose weight

which has an impact on the osteoarthritis of her knees...Now that she has had replacement of both knees, she still has deformity of the knees with antalgic gait, she will be able to manage her physical care but I see no prospect of her returning to any kind of job in the future. In my opinion I strongly feel she should be retired on medical grounds.”

12. On 9 October 2017, NHS BSA sent Miss S a response under stage two of the IDRP that upheld its previous decision. It considered Dr Patel’s report and concluded that:

“Whilst accepting that the applicant is currently significantly disabled as a result of her degenerative knee related problems there is further intervention in the form of revision surgery to her right knee which I would expect to result in significant improvements in her mobility...I note that she has 17 years before she reaches her benefit age and therefore that gives substantial time between now and her normal benefit age for a weight loss programme to be successful. It is my view therefore that permanency has therefore not been established and that it cannot be indicated that the applicant is permanently unable to undertake the substantive duties of her NHS post as a support worker/domestic assistant between now and her normal benefit age. As such it is my opinion that the criteria for Tier 1 has not been met.”

13. In June 2018, Miss S brought her complaint to this Office.

14. On 3 September 2018, NHS BSA sent this Office a formal response that said:

“In matters medical decisions are seldom black and white. A range of opinions may be given from various sources, all of which must be considered and weighed. However, the fact that [Mrs S] 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 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 90, to meet the Tier 1 condition, on the balance of probabilities, Miss S must be deemed permanently (that is to age 67) incapable of efficiently discharging the duties of her NHS employment. To meet the Tier 2 condition, Miss S must be additionally permanently incapable of regular employment of like duration to her NHS post.

- NHS BSA needed to consider Miss S' IHRP application in-line with the Scheme's Regulations, all the relevant medical evidence and, properly explain its decision to Miss S. The Adjudicator was satisfied that NHS BSA had done so and, it was her view that, it was for NHS BSA in consultation with its MA, to attach weight (if any) to that evidence.
 - The Scheme's MA concluded that Miss S had 17 years to her retirement age, and with the right treatment, she would be capable of going back to her NHS post before age 67.
 - A difference of medical opinion between the MA and Miss E's GP, as to her capacity for work before age 67, is not sufficient for an Ombudsman to say that NHS BSA's decision to accept the opinion of its MA was flawed.
 - The Adjudicator appreciated that Miss S did not consider NHS BSA's decision was satisfactory, but in her opinion, the decision was properly made. Consequently, there were no grounds for an Ombudsman to remit the matter back to NHS BSA.
 - Therefore, the Adjudicator did not uphold the complaint.
16. Miss S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss S referred to her current health condition having deteriorated. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Miss S for completeness.

Ombudsman's decision

17. My role is to decide if 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.
18. 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.
19. NHS BSA is required to consider the prognosis of an applicant for an IHRP as at the date of the application. That 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.
20. I find that NHS BSA considered all Miss S' relevant medical evidence and abided by the Scheme's Regulations. I find no reason to remit her case back to NHS BSA for re-consideration.

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21. Therefore, I do not uphold Miss S' complaint.

Karen Johnston

Deputy Pensions Ombudsman
14 December 2018