

Ombudsman's Determination

Applicant	Ms C
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Ms C'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. Ms C's complaint is that she has been refused ill health early retirement (**IHER**).

Background information, including submissions from the parties

4. On 11 May 2016, Ms C ceased employment as a Receptionist working 12 hours per week.
5. On 10 June 2016, Ms C made an application for IHER due to severe symptoms of anxiety and work-related stress.
6. On 24 June 2016, Ms C's case was referred to the Scheme's medical advisor (**MA**) who took into consideration all relevant medical evidence including: form AW33E Part C completed by the GP, Dr Hopkins dated 3 June 2016; correspondence from the Occupational Health Nurse, A Wilson, dated 15 March 2016; information about sickness absence management and rehabilitation given by the employer on Form AW33E part A; and information Ms C gave on Form AW33E part B.
7. The MA referred to Dr Hopkin's report, who stated that Ms C has never had counselling/therapy under the care of the mental health team. The MA was of the opinion that Ms C is likely to experience a positive response to medication from different classes and perhaps in combination with psychological therapies, behavioural therapies, specific therapies for obsessional traits, sleep hygiene measures and specialist services involvement for any refractory symptoms.

8. The MA concluded that on the balance of probabilities Ms C is not permanently incapable of the NHS employment, the Scheme condition for Tier 1 is not met and as such Tier 2 cannot be met. Based on this NHS BSA turned down Ms C's application for IHER on the grounds that the Tier 1 condition had not been met.
9. On 1 September 2017, Ms C 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**).
10. On 29 September 2017, NHS BSA issued its stage 1 IDRP response to Ms C. NHS BSA had referred the matter to a new MA, who took into account all previous evidence on Ms C's file, including: letter from Ms C dated 1 September 2017; and community mental health service's appointment notification letters dated 13 December 2016, 5 December 2016, 14 February 2017, 13 April 2017, 23 June 2017 and 20 July 2017. The MA was of the view that based on the evidence provided by Ms C's GP and her employer, it would indicate that Ms C had always struggled with her work and that the worsening in her anxiety condition over the last 3-4 years has made it impossible for her to continue in work. However, it is necessary to determine not only whether there are treatments available but that those treatments would have a reasonable chance of improving Ms C's condition to allow her to return to work. The MA said Ms C's statement that she has been unable to tolerate the medication, and the counselling services that she has received to date indicates that she has had a limited exposure, but the reasons for her intolerance and whether she would not be able to tolerate or benefit from other treatments is not known. The MA said evidence from the mental health service provider would be required, to demonstrate whether or not there were further medication and counselling options available, and also whether those treatment options would or would not have a reasonable chance of returning Ms C to her NHS, or any other employment.
11. The MA was of the opinion, on the balance of probabilities, that Ms C does not meet the Tier 1 condition of permanent incapacity for the efficient discharge of the duties of the NHS employer and Tier 2 has therefore not been met. Based on this opinion NHS BSA did not uphold Ms C's complaint and her application for IHER was not granted.
12. On 26 March 2018, Ms C appealed the decision under stage 2 of the IDRP.
13. On 1 May 2018, NHS BSA issued its stage 2 IDRP response to Ms C. NHS BSA referred the matter to a new MA who took into account all previous evidence including reports from Mr Lyons, psychological therapist, dated 5 December 2017, and 14 March 2018; referral documents submitted with the IDRP stage 1 review and the report from OH Wilson dated 5 May 2016; and notification of appointment letters between December 2016 and July 2017. The MA noted that all the medical evidence submitted as part of the IDRP process post-dates Ms C's last day of service and as such were not relevant to the determination of whether she satisfied the Scheme eligibility conditions as of her last day of service. The MA was of the opinion that, on the balance of probabilities, at the time of leaving employment, Ms C did not meet the

Tier 1 condition of permanent incapacity for the efficient discharge of the duties of her NHS employment. The Tier 1 condition was therefore not met.

14. The MA acknowledged that, at the time of leaving employment, Ms C had a physical or mental infirmity as a result of which she was incapable of efficiently discharging the duties of her employment, but the question was whether her incapacity was likely to have been permanent. The MA said at the time Ms C left employment she was at an early stage in her therapeutic journey, and there is no evidence that, at the time she left employment, she had had the opportunity of assessment by a psychiatrist. Therefore, there was scope for her to receive appropriate psychological therapy, and scope to use an alternative antidepressant drug with a different mode of action. The MA also said, at the time Ms C left employment, further treatment options were available which she would have benefited from, as the majority of individuals with anxiety and OCD do benefit from treatment. However, the benefits of treatment for these conditions usually come about in a timescale that is measurable in months. At the time Ms C left employment, she was over 5 years away from Scheme pension age. Therefore, the benefits of future treatment were likely to have been realised before she reached the Scheme pension age. It was the MA's opinion, on the balance of probability, at the time Ms C left employment that future treatment was likely to have altered the permanence of Ms C's incapacity.
15. Based on the view of the new MA, NHS BSA did not uphold Ms C's complaint and held that she was not entitled to IHER. The decision maker accepted the MA's recommendation which acknowledged that, at the time of leaving employment, Ms C had a physical or mental infirmity, as a result of which she was incapable of efficiently discharging the duties of her employment. However, the decision maker said it was more likely than not that the benefits of treatment would have been sufficient to have enabled Ms C to resume her normal role.

Adjudicator's Opinion

16. Ms C'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:-
 - The Ombudsman's role is not to decide whether Ms C is eligible for IHER; that was a matter for NHS BSA to decide after obtaining requisite certification from a MA. 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 were flaws in the decision-making process, the Ombudsman can require NHS BSA to look at Ms C's case again. However, the weight attached to any of the evidence was for NHS BSA to decide, including giving some of it little or no weight. It was also open to

NHS BSA to prefer the advice of its own medical advisers unless there was a cogent reason why it should not.

- The Adjudicator was satisfied that the MA had considered all of the relevant medical evidence when making his assessment, so there has been no error or omission of fact in NHS BSA's reasoning, it did not misconstrue the Scheme's criteria for ill health retirement. Further, NHS BSA has given the reason for its opinion to not award Ms C IHER and, consequently, it was reasonable, not perverse, for NHS BSA to decide to turn down her application.
- Ms C said that NHS BSA failed to take into account the true facts about her illness. However, looking at the stage 2 IDRPs response it was Adjudicator's view that the MA had access to all relevant medical records and based his opinion on such evidence. NHS BSA then made its decision on the basis of the MA's report. The fact that the MA's opinion differs from that of Ms C's GP does not mean it is incorrect. She was of the opinion that NHS BSA had considered all the relevant information.

17. Ms C did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms C 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 Ms C for completeness.

Ombudsman's decision

18. Ms C has said that she has now been diagnosed with Osteoarthritis of joints and Osteopenia, which has resulted in her mental health deteriorating. However, as explained by the Adjudicator in the Opinion, my role is not to review the medical evidence and come to a decision of my own but to consider the decision making process. However, this new condition was diagnosed after the conclusion of her IHER application, and so NHS BSA cannot take it into account. I have reviewed the whole process, from the time Ms C made her application for IHER, to when NHS BSA issued its IDRPs stage 2 response, and I find that NHS BSA has considered all the relevant facts and followed the procedure correctly. There are no justifiable grounds for me to find that NHS BSA's decision was perverse or that the process undertaken to reach its decision was flawed.

19. Therefore, I do not uphold Ms C's complaint.

Anthony Arter

Pensions Ombudsman
16 April 2019