

Ombudsman's Determination

Applicant	Mrs Y
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

1. Mrs Y's complaint against NHS BSA is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) NHS BSA shall pay Mrs Y £500 for the significant distress and inconvenience caused to her by its mishandling of her case.

Complaint summary

2. Mrs Y's complaint concerns NHS BSA's decision to refuse her application for ill health early retirement (**IHER**) as an active Scheme member and its delay in dealing with her application.

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. On 17 March 2017, Mrs Y applied for IHER due to osteoarthritis of her thumb carpometacarpal joints.
5. On 5 April 2017, NHS BSA turned down Mrs Y's application for IHER. It said that it had considered the following medical evidence: -
 - form AW33E Part C completed by the Consultant Orthopaedic Surgeon, Mr Katchburian, dated 1 March 2017;
 - information about sickness absence management and rehabilitation given by the employer on form AW33E Part A and in Management Statement of Case; and
 - information from the applicant given on form AW33E Part B.
6. Mrs Y's sickness record showed a continuous absence from 29 March 2016. Mrs R confirmed she had steroid injections via x-ray machine to both her hands last year

and it had little to no effect. Mr Katchburian said that “although the applicant is currently incapable of her NHS role it is considered that she is more likely than not to recover capacity for her role, given surgical treatment and subsequent rehabilitation. She is more likely than not to be able to complete this and regain capacity for her role, within the 5 year period to her normal benefit age.”

7. Based on the medical evidence NHS BSA said that on the balance of probabilities Mrs Y was not permanently incapable of NHS employment, therefore the Scheme's condition for Tier 1 benefits had not been met. Further, as she was not permanently incapable of regular employment of like duration, she had not met the Scheme's condition for Tier 2 benefits.
8. On 7 April 2017, Mrs Y was dismissed from employment due to ill health.
9. On 24 April 2017, Mrs Y 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 11 December 2017, NHS BSA incorrectly assessed Mrs Y's IHER application as a new application, rather than an appeal of the 5 April 2017 decision, and turned her down for IHER.
11. On 15 December 2017, NHS BSA emailed Mrs Y confirming that it had mistakenly registered her complaint as a new application and not as an internal dispute under the Scheme's IDRP.
12. NHS BSA referred the matter to a new Medical Advisor (**MA**), Dr Evans who considered the following evidence: -
 - the referral documents relating to Mrs Y's case. including the report from Mr Katchburian, dated 17 April 2018;
 - report from the senior Occupational Health Advisor dated 7 February 2017;
 - Mrs Y's statement dated 24 April 2017;
 - form AW33E; and
 - additional information provided by Mrs Y.
13. Dr Evans accepted that in the absence of future treatment, Mrs Y's incapacity was likely to be permanent. However, he said that at the time Mrs Y left employment, further treatment was available in the form of surgery. Dr Evans' was of the opinion that if Mrs Y did proceed with surgery, the outcome was likely to be such that she would be able to resume her duties after a period of around 6 months. NHS BSA issued its stage one IDRP response to Mrs Y on 22 May 2018 confirming it did not uphold Mrs Y's appeal as she did not meet the requirement for Tier 1 IHER benefits.
14. On 8 October 2018, Mrs Y appealed under stage two of the IDRP.

15. NHS BSA referred the matter back to a new MA, Dr Rooms. Dr Rooms considered the following evidence: -
- the referral documents;
 - letter from the Trauma and Orthopaedics department at Maidstone Hospital dated 24 July 2018, Mr S Robati, specialist register in orthopaedics;
 - discharge notification, Maidstone Hospital dated 14 May 2018;
 - letter from Mr Katchburian, dated 23 October 2017;
 - letter and report from Mr Katchburian dated 17 April 2018; and
 - a scientific paper titled “Orthopaedics and Traumatology: Surgery and Research.”
16. In his report Dr Rooms referred to Mr Katchburian’s report stating that Mrs Y had not benefited from joint steroid injections and was on the waiting list for a trapeziectomy for her left hand. He noted that the trapeziectomy had subsequently been performed in May 2018, the outcome of which was likely to be such that Mrs Y would be able to resume her NHS duties. He noted that Mrs Y is currently on the waiting list for an operation on her right hand and there is expectation that her functional level would allow her to return to her job as a phlebotomist in 2020. Dr Rooms was of the opinion that, at the time of leaving employment, Mrs Y had a physical or mental infirmity as a result of which she was incapable of efficiently discharging the duties of her employment. However, this incapacity was unlikely to have been permanent and as such the criteria for Tier 1 IHER benefits was not met.
17. NHS BSA issued its stage two IDRP response to Mrs Y on 12 November 2018. NHS BSA held that the decision not to award Mrs Y Tier 1 IHER was reasonable given all the medical evidence. It said that as there were further treatment options available Mrs Y was likely to regain capacity for her normal role.

The Pension Ombudsman’s Position on Ill Health Benefits

18. 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.
19. 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.
20. 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.
21. 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.

22. 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.
23. 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

24. Mrs Y's complaint was considered by one of our Adjudicators who concluded that 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 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 Pension Scheme Regulations 2015, specifically Regulation 90 which covers ill health retirement.
 - Two tiers of benefits are available to individuals who leave the Scheme as a result of ill health. The level of benefit is based on the severity of the individual's condition and their capacity for future employment. Tier 1 benefits are awarded to individuals whose employment is terminated because of physical or mental infirmity as a result of which they are permanently incapable of efficiently discharging their duties of employment. To qualify for Tier 2 benefits, in addition to meeting the Tier 1 conditions, the individual must be permanently incapable of engaging in regular employment of like duration.
 - 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.
 - Mrs Y has said that Mr Katchburian's report explains the severity of her condition without a definitive treatment or cure. NHS BSA have said that it has properly considered Mrs Y'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 Mrs Y challenged the first decision not to award IHER to when NHS BSA issued its IDRP

stage 2 response, it was the Adjudicators opinion that NHS BSA considered all the relevant facts and followed the procedure correctly. NHS BSA considered Mrs Y's application three times in total 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.

- Dr Rooms and Dr Evans were of the opinion that Mrs Y was not permanently incapable of discharging efficiently the duties of her employment by reason of ill health or infirmity of body or body (until age 65) and she was likely to be capable of undertaking gainful employment before normal pension age. They both said that Mrs Y's conditions were unlikely to be permanent and with surgical treatment and subsequent rehabilitation there is time for the benefits of such treatment to be realised before Mrs Y reaches pension age.
- Mrs Y disagreed with Dr Rooms and Dr Evans assessment and presented her counter arguments. She said since their assessment she has had her second trapeziectomy to her right hand and is still finding it difficult to function normally. However, Dr Rooms and Dr Evans were considering Mrs Y's application for IHER in April 2017 prior to the surgery and were required to give their opinion based on the balance of probabilities at that time. The Adjudicator recognised that Mrs Y disagreed with Dr Room's and Dr Evans' report, but this was not sufficient reason for her case to be remitted back to NHS BSA for the application to be reconsidered.
- Mrs Y 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 Mrs Y's IHER 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 complied with the Scheme's Regulations and that all relevant evidence has been considered.
- Mrs Y asserts that NHS BSA delayed responding to her complaint. A scheme's IDRPs must ensure that decisions are reached, and notified to applicants, within a "reasonable period". The Pensions Regulator's guidance provides that the relevant decision-maker will be expected to determine disputes within four calendar months of receiving the application. The four-month period applies separately to each determination stage. The Adjudicator noted that when Mrs Y appealed against NHS BSA's decision in April 2017, her case was registered as a new application and not an internal dispute. This was only corrected in December 2017 with the IDRPs stage one being issued in May 2017 over one year later. The Adjudicator was of the view the length of time taken to issue a response to Mrs Y was unreasonable and would have caused her significant distress and inconvenience.
- Given the way in which the matter has been handled by NHS BSA during the IDRPs process, the Adjudicator was of the opinion that it should pay Mrs Y £500 to

reflect the significant distress and inconvenience caused by its mishandling of her case during IDRP stage one.

25. Mrs Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs Y 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 Mrs Y for completeness.

Ombudsman's decision

26. Mrs Y has said NHS BSA's reasoning to not grant her IHER is based on reports and opinions from over two years ago and not since she has had her operations. 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 as it was at the time the decision fell to be made. At the time of Mrs Y being dismissed from her position in April 2017 both Dr Rooms and Dr Evans gave their decision on the balance of probability using the evidence available at that time. I sympathise that Mrs Y has had her operations since then, and therefore it is now possible to consider the actual outcome of surgery, however, NHS BSA, in reviewing its decision, cannot take into account events which have occurred after her IHER application was considered. I have reviewed the whole process, from the time Mrs Y made her application for IHER, to when NHS BSA issued its IDRP stage 2 response, and I find that throughout NHS BSA has considered all the relevant facts and applied the scheme rules correctly to the decision whether to grant IHER. There are no justifiable grounds for me to find that NHS BSA's decision was perverse or that the substantive decision was flawed.
27. However, NHS BSA did make a procedural error in failing initially to recognise that Mrs Y was appealing.
28. Therefore, I partially uphold Mrs Y's complaint.

Directions

29. Within 21 days of the date of this Determination: -
- NHS BSA shall pay Mrs Y £500 for the significant distress and inconvenience caused to her by its maladministration.

Karen Johnston

Deputy Pensions Ombudsman
21 August 2019