

## Ombudsman's Determination

Applicant	Mr K
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondent	NHS BSA

## Outcome

1. I do not uphold Mr K's complaint and no further action is required by NHS BSA.

## Complaint summary

2. Mr K has raised a complaint against NHS BSA because his application for deferred ill health retirement (**IHR**) has been turned down.

## Background information, including submissions from the parties

3. In April 2016, Mr K stopped working for the NHS. Mr K was previously employed full-time.
4. In July 2018, Mr K's physiotherapy department wrote to him stating that it was discharging him as he had not contacted it or attended a "positive pain management programme".
5. On 29 October 2018, Mr K applied for deferred IHR.
6. On 21 November 2018, after receiving a report from a suitably qualified independent registered medical practitioner (**IRMP**), NHS BSA wrote to Mr K refusing his application for IHR. NHS BSA said that:-
  - Mr K was not permanently incapacitated and would likely recover functional capacity to work a similar employment before normal pension age (**NPA**).
  - Although incapable of working currently, 26 years remained until Mr K reached NPA.
  - With appropriate treatment, it was "more likely than not that this applicant will improve sufficiently to be clinically capable of low demand, relatively routine and

predictable, regular employment, full time, within the period to his normal benefit age”.

7. On 26 November 2018, Mr K raised a complaint under the Scheme’s internal dispute resolution procedure (**IDRP**). Mr K submitted further medical evidence from his General Practitioner (**GP**), Dr Yates. Mr K also submitted corroborative evidence of his circumstances and proof of his entitlement to Department for Work and Pensions (**DWP**) incapacity benefits. Mr K said that as he was entitled to the Personal Independence Payment (**PIP**), he should also meet the criteria for IHR.
8. On 18 January 2019, another IRMP provided NHS BSA with a report on Mr K’s health based on the supplementary medical evidence Mr K had submitted in support of his application. The IRMP said that:-
  - The corroborative evidence of Mr K’s impaired mental health provided no information about the likely, future prognosis of his psychological illness. Mr K’s prognosis was a central factor to consider in his IHR application.
  - Subsequent developments in Mr K’s health after his original IHR application were not relevant to the consideration if he satisfied the Scheme criteria for IHR at the time of his original application. Any evidence dated after that date would not be considered.
  - Mr K was currently unfit for regular, full time employment and his health was unlikely to improve spontaneously. Mr K had multiple health conditions that interacted unhelpfully with each other.
  - Mr K had not been assessed by a psychiatrist and the efficacy of untried psychological treatments would likely remove his impaired mental health as an obstacle to future employment. The benefit of this treatment would likely be realised in months or a small number of years.
  - Permanent incapacity could not be established. In view of the wide range of untried treatments, and their likely benefits, it was more likely than not that Mr K would return to full-time employment before NPA.
9. On 24 January 2019, NHS BSA provided its Stage 1 IDRP response and did not uphold Mr K’s complaint. NHS BSA said that, having considered the IRMP’s opinion, it agreed with the conclusion that Mr K was not permanently incapable of returning to full time work.
10. On 28 January 2019, Mr K requested that his complaint be considered under IDRP Stage 2 and maintained his previous arguments.
11. On 4 March 2019, NHS BSA sent Mr K its Stage 2 IDRP response not upholding his complaint and said that:-
  - It needed to be satisfied that Mr K was incapable of a job of ‘like duration’ and not just of his previous NHS role. Also, that Mr K’s incapacity was permanent.

- There was a significant interaction between Mr K's mental health and his fibromyalgia pain. There were positive options for psychological treatments that would have a "positive functional impact" on Mr K's fibromyalgia, mental health and pain.
- No significant abnormality accounted for Mr K's reported knee symptoms.
- Based on the facts, it maintained that Mr K was not permanently incapable of full-time employment and did not meet the Scheme criteria to be granted IHR.

## Adjudicator's Opinion

12. Mr K'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 Mr K is eligible for IHR; that is a matter for NHS BSA to decide after obtaining evidence and a report from a suitably qualified IRMP. 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 Scheme's 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 K'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, or, should not without seeking clarification. This might include errors or omissions of fact on the part of the IRMP, or a misunderstanding of the relevant Regulations. The Adjudicator reviewed Mr K's case on this basis.
- Eligibility for IHR is stipulated in the 2015 Scheme Regulations which are provided below:-

### **"Regulation 94 Early retirement on ill-health (deferred members)**

(1) A deferred member (DM) is entitled to immediate payment of a pension if—

(a) DM is not in NHS employment;

(b) DM has not attained normal pension age;

(c) the scheme manager is satisfied that DM suffers from physical or mental infirmity as a result of which DM is permanently incapable of engaging in regular employment of like duration; and

(d) DM claims payment of the pension."

- NHS BSA is entitled to ascribe little weight to recommendations in support of Mr K being granted IHR from his specialists. Particularly if those recommendations are not made with reference to the criteria laid out in the Regulations. Mr K believes that his eligibility for DWP incapacity benefits should be considered as evidence of his eligibility for Scheme IHR. However, the criteria stipulated in the Regulations for IHR is different to the criteria for awarding the DWP's PIP. In the Adjudicator's view, Mr K's eligibility for DWP benefits had no bearing upon his eligibility for Scheme IHR.
  - IHR decisions can only be made on the balance of probabilities. In the Adjudicator's opinion, NHS BSA appropriately considered the question of whether Mr K would likely be permanently incapable of performing regular employment of like duration to his previous NHS role until NPA. NHS BSA sought more than one IRMP report after Mr K submitted further evidence in support of his application. The IRMPs' reports assessed Mr K's functional capacity and his likelihood of returning to an employment of like duration.
  - It is for NHS BSA to apportion weight (if any) to the relevant medical evidence as it sees fit. However, it should be able to justify why it prefers one opinion over another. It was not disputed that Mr K was currently incapable of full-time employment. However, in order to qualify for IHR, Mr K would need to be permanently incapable of full-time employment until NPA.
  - The evidence supplied supported the finding that NHS BSA reviewed Mr K's IHR application appropriately. Mr K feels that NHS BSA disregarded the evidence he supplied and that it did not consider his entitlement to DWP disability benefits. The Adjudicator said that NHS BSA gave due consideration to Mr K's future prognosis and health until NPA in making its decision. In the Adjudicator's opinion, NHS BSA thoroughly assessed all of the available evidence to ascertain whether Mr K met the necessary requirements under the Scheme Regulations for granting IHR, and did not reach a flawed decision.
13. Mr K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr K 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 main points made by Mr K for completeness.

### **Ombudsman's decision**

14. Mr K disagrees with NHS BSA's decision not to grant him IHR. However, Mr K's disagreement on its own is insufficient grounds for me to remit the matter back to NHS BSA for his application to be re-considered.
15. As explained by the Adjudicator in his Opinion, my role is not to review the medical evidence and come to a decision of my own but to consider NHS BSA's decision-making process. I agree with the Adjudicator's view that there is no dispute that Mr K

is currently incapable of working an employment of like duration to his previous NHS role. However, this is insufficient to meet the Scheme definition for IHR as permanence until NPA must also be established.

16. Mr K states that he was discharged by the Physiotherapy team because it cancelled his appointment and not because he did not attend. Having reviewed the papers, I am satisfied that NHS BSA did not give undue consideration to this point in refusing Mr K's application. NHS BSA concluded that untried physical and psychological treatments were commonly available and likely to have a significant, functional impact upon Mr K's health within a low number of years. Consequently, I agree with the Adjudicator's view that NHS BSA adequately considered Mr K's health and his likely prognosis until NPA in making its decision.
17. Mr K maintains that NHS BSA made its decision without consideration for the evidence he supplied from Dr Yates and his entitlement to DWP incapacity benefits. Mr K says that NHS BSA reached a flawed decision for this reason. NHS BSA is entitled to give little weight to evidence in support of Mr K being granted IHR from DWP assessors if those recommendations are made without reference to the Scheme Regulations. It was good practice for NHS BSA to seek further IRMP reports after Mr K submitted further evidence in support of his IHR application during the IDR. P.
18. I appreciate that Mr K has worked for all of his adult life and that he considers his health to now be deteriorating. I have sympathy with the position in which Mr K finds himself. Mr K argues that colleagues in similar circumstances to him have been awarded IHR. However, each IHR application must be judged on its own merits and the balance of probabilities. Consequently, meaningful comparisons are not possible between Mr K's IHR application and that of other members and I will not comment on them further.
19. NHS BSA must consider all of the relevant factors and not consider any irrelevant factors. I can see no evidence that NHS BSA has not considered Mr K's application for IHR in accordance with the Regulations and the available medical evidence. Consequently, there are no justifiable grounds for me to find that NHS BSA's decision was unreasonable or that the process undertaken to reach it was flawed.
20. I do not uphold Mr K's complaint.

**Anthony Arter**

Pensions Ombudsman  
27 November 2019