

Ombudsman's Determination

Applicant	Ms Y
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHSBSA)

Outcome

1. I do not uphold Ms Y's complaint and no further action is required by NHSBSA.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms Y complains about the refusal of NHSBSA to award her a pension and a lump sum from the Scheme following the death of her brother (**Dr Y**).

Background information, including submissions from the parties

4. Dr Y was a member of the Scheme. He was unmarried, and had one sister, Ms Y. She worked as a biochemical research associate and lecturer at an American university until 1981. After Ms Y received medical advice from Dr Y that the stress of her current occupation was causing her ill health (she was suffered from a duodenal ulcer) she decided to stop working and return to the UK. After that, Dr Y regularly gave Ms Y financial support and paid her medical and phone bills
5. In 1985 Ms Y injured her back and right hand in a skiing accident. She later developed arthritis.
6. Sadly, Dr Y died on 28 August 1988. At that date Ms Y was 36 years old.
7. A nurse, Miss E, then claimed that Dr Y was the father of her son, Mr R, who had been born in September 1987. Ms Y disputed that Dr Y was the baby's father.
8. Ms Y started to administer Dr Y's estate on behalf of her elderly mother. However, the guardians of Mr R then lodged a court application to revoke her administration. Ms Y applied to the DHSS for payment of the death benefits payable from the Scheme, but the DHSS said that it would not make any payment until the court application had

been heard. The court then appointed a chartered accountant, Mr X, to administer Dr Y's estate.

9. In December 1989 Ms Y and her mother applied to the High Court for interim financial provision to be made for them from Dr Y's estate. In October 1990 the court ordered £6,500 to be paid to Ms Y.
10. In January 1990 the Scheme paid the lump sum death benefit of £26,604.24 arising on Dr Y's death to Mr X as the current administrator of Dr Y's estate, consistent with the court order.
11. In November 1990 Ms Y's mother died. The following month Ms Y's general practitioner wrote that Ms Y had been suffering from a stomach ulcer which was stress-related, and was on constant medication.
12. Ms Y disputed the paternity claim made by Miss E, and obtained a court order in January 1991 that blood samples should be taken in order to prove Mr R's paternity. However, Miss E refused to allow her son to be tested.
13. Ms Y obtained court orders in 1994 for further financial provision for herself from Dr Y's estate.
14. On 24 February 1995 NHS Pensions (a service provided by NHSBSA) told Ms Y, in response to her enquiry, that it could not give her details of a child's allowance that had been paid to Mr R unless Miss E gave written consent.
15. Ms Y said that later that year her right wrist and back were injured in an assault by a policeman, she was mugged by two men and, in another incident, her left leg was injured by a reversing car.
16. In January 1997 Ms Y attended a fracture clinic for a thumb injury. Later that year Ms Y was referred to an orthopaedic surgeon.
17. In September 1997 lawyers acting for Ms Y sought payment of a child allowance from the Scheme for Ms Y. On 28 October 1997 NHS Pensions responded as follows:

"I can confirm that an allowance can become payable to a child who is dependent upon a member at the time of their death. However, in this case there will be no further benefits payable to [Ms Y]."
18. In 1998 Ms Y instructed new lawyers, who asked NHS Pensions to advise what form the evidence should take. NHS Pensions replied on 11 November 1998 that a written report from Ms Y's doctor would be needed, describing her symptoms.
19. Ms Y's lawyers submitted a medical report on 17 November 1998, which said that, in the doctor's view, Ms Y was eligible for incapacity benefits due to a psychiatric illness, not her wrist injury: "it won't be long before her paranoid delusions will return. I therefore do not think this lady is able to work now or at any time in the foreseeable future."

20. A medical report on Ms Y's wrist injury was obtained in December 1998. The report concluded that the injury in 1995 could probably be relieved by minor surgery. The report did not comment on her ability to work in 1988.
21. On 24 March 1999 NHS Pensions informed the lawyer currently instructed by Ms Y that for a child allowance to become payable to Ms Y under the NHS Pension Scheme Regulations 1980 she would need to be:

“a dependent of the deceased and by reason of permanent ill-health or infirmity of mind or body...at the time of death of that person, incapable of earning her own living and has at all times subsequently remained incapable.”
22. NHS Pensions said it would therefore need to see:

“medical evidence from the time of [Dr Y's] death up to and including the present time. The evidence that we have received in the past is not sufficient as it only refers to her health from 1997.”
23. In September 1999 Ms Y's lawyers tried to obtain a medical report from her old doctor on her ill health between 1988 and 1991. The doctor requested a fee for complying, so the matter was not taken further. When requested, NHS Records department was unable to provide Ms Y with a copy of the report. NHS Pensions told Ms Y's lawyers in October 1999 that medical evidence from August 1988 would be required to support her claim.
24. In November 2003 a consultant rheumatologist's report was obtained on Ms Y's injuries sustained in 1995. The report concluded:

“With regard to employment, she has been away from her work as a biochemist now for a number of years and no doubt techniques and methods have changed over that time and a much greater degree of automation in such work has displaced many laboratory biochemists. I believe therefore that for these reasons as much as those of her potentially untreatable disabilities, she is unlikely to return to that occupation.”
25. However, the report did not comment on her ability to work in 1988.
26. Further doctors' and consultants' reports on Ms Y were obtained in 2005 and 2006. These focussed on the injuries caused in 1995 and also diagnosed several new medical conditions including spinal problems. Again, they did not comment on her ability to work in 1988.
27. A medical update on Ms Y's condition was obtained from her general practitioner in December 2008.
28. An X-Ray in 2009 showed that Ms Y had developed scoliosis.

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29. On 23 October 2012 Ms Y wrote to NHS Pensions to ask for any lump sum death benefit and monthly payments payable to her from the Scheme. On 27 November 2012 NHS Pensions replied:

“There is no further lump sum death gratuity payable from the Scheme. With regard to your claim for child allowance, we are still awaiting your medical evidence from the time your brother died on 28 August 1988.”

30. NHS Pensions clarified on the telephone shortly afterwards that the lump sum death benefit had already been paid.

31. Ms Y wrote to NHS Pensions on 5 February 2013 to explain why, in her view, she was entitled to both a dependant’s pension and a lump sum death benefit from the Scheme. She mentioned that Dr Y had made a will naming Ms Y and her mother as beneficiaries on his death, but after he died a briefcase containing the will had been stolen from her house.

32. On 12 February 2013 Ms Y’s former doctor told her that her medical records from 1990-1991 had been transferred to her current doctor, but her current doctor could not locate them. Ms Y then asked the local health authority to provide a copy. It informed her on 22 March and 2 May 2013 that despite an extensive search it could not trace her old records.

33. On 10 April 2013 NHS Pensions told a third firm of lawyers instructed by Ms Y that although she had made numerous claims for a child allowance she not supplied any medical evidence dating earlier than 2008, despite her previous lawyers having been asked in October 1999 to provide evidence from 28 August 1988 to the current date. NHS Pensions also said that after 1999 it received no further communications from Ms Y until August 2012.

34. On 22 May 2013 NHS Pensions informed Ms Y’s lawyers that notwithstanding the various medical reports that she had recently supplied, it still needed to see:

“medical evidence provided by a general practitioner or hospital doctor relating to her health from 28 August 1988 to current day. We have only received some details from 1990 onwards...Ms [Y] has not supplied any medical evidence earlier than 2008...”

35. In June 2013 Ms Y submitted evidence of her financial dependency on Dr Y, including copies of international money orders and the court orders made in her favour. NHS Pensions replied on 26 June 2013:

“I am sorry to tell you we cannot pay you an allowance. Our medical advisers have rejected your claim because the information you have supplied does not support your claim that you have been incapable of earning your own living since 28 August 1988 through permanent physical or mental infirmity.”

36. On 29 August 2013 NHS Pensions told Ms Y that her claim would be rejected, saying:

“A child allowance can be paid for a dependent relative of a member of this scheme. This can include a dependent who is incapable of earning a living because of permanent physical or mental infirmity from which they were suffering at the time the member died.

Your brother...died on 28 August 1988.

You first claimed child allowance on 25 September 1997. Since then we have received no actual medical evidence to support your claim that you have been incapable of earning a living because of permanent physical or mental infirmity from which you were suffering at the time [Dr Y] died...If you wish to proceed with your claim for an allowance please supply evidence of permanent physical or mental infirmity from which you were suffering at the time your brother died on 28 August 1988.”

37. Another general practitioner’s report on Ms Y was obtained in March 2014. However, this did not comment on her ability to work in 1988.

38. In April 2014 Ms Y asked NHSBSA to reconsider its position. On 9 May 2014 NHSBSA replied:

“The medical evidence you have provided refers to the conditions you have suffered from since 1995. While this is helpful in establishing your current position, it does not confirm that you were permanently incapable of earning your own living due to ill health when [Dr Y] died. To consider your case further we therefore require evidence relating to any conditions you may have had in 1988”.

39. As she was unhappy with the responses she had received, Ms Y made a complaint under the Scheme’s internal dispute resolution procedure (IDRP). She said that many of Dr Y’s papers, including records of her illnesses and his will, had been stolen after he died. She pointed out that the High Court had accepted her evidence of financial dependency on Dr Y when it had made financial provision for her.

40. At stage 1 of the IDRP, decided by the NHSBSA disputes officer in February 2015, Ms Y’s claim was unsuccessful. The disputes officer agreed with the advice of the Scheme’s medical adviser that the evidence provided by Ms Y:

“does not support there being a permanent incapacity for work because of physical or mental infirmity she was suffering at the time of her brother’s death.”

41. Ms Y’s appeal under stage 2 of the IDRP was turned down by NHSBSA’s disputes manager on 29 June 2015 on the grounds that:

“no new evidence has been provided to support your claim that you were incapable of earning a living because of permanent physical or mental infirmity at the time your brother died.”

42. When Ms Y contacted The Pensions Advisory Service it said that it could not help Ms Y as the medical evidence she had provided was insufficient.
43. Ms Y then contacted us. She alleged that in refusing to pay her any death benefits from the Scheme the NHSBSA was biased and had violated the principles of natural justice, and the relevant staff were guilty of corruption and collusion. Although Dr Y had died many years before, we exercised our discretion to accept the complaint for investigation on the grounds that Ms Y had gone through the Scheme’s IDRPs within the last three years.
44. NHSBSA’s formal response to us in March 2016 said that although Ms Y satisfied the financial dependency requirements she did not satisfy the incapacity conditions of Regulation H1 of the NHS Pension Scheme Regulations 1995 (as amended).

Adjudicator’s Opinion

45. Ms Y’s complaint was considered by one of our Adjudicators, who concluded that no further action was required by NHSBSA. The Adjudicator’s findings are summarised briefly below:-
 - The Scheme was governed by statutory regulations, and should only pay benefits to those persons who satisfied the stringent eligibility criteria set out in the regulations. It was clear from the evidence that Ms Y submitted that she had to endure several chronic health problems, and also suffered several injuries over the years, but the key question was whether she satisfied the relevant criteria in the regulations for payment of a dependant’s pension when Dr Y died.
 - In the relevant regulations (see Appendix), this benefit is called a child allowance, although it may be payable to an adult dependent brother or sister of the deceased member who is incapable of earning a living at the time the member died because of permanent physical or mental ill-health or infirmity from that time.
 - There were therefore two tests to be satisfied: (1) dependency and (2) inability to earn a living (unemployability). Ms Y satisfied the first test, but did not satisfy the second test: after Dr Y died, Ms Y supplied evidence of her financial dependency on him, as required, but she did not provide satisfactory medical evidence, namely that due to her ill health as at August 1988 she was incapable of earning a living.
 - Although Ms Y provided the NHSBSA with copies of various medical reports, and also relied on the court orders that she should receive financial provision from Dr Y’s estate, these documents did not comment on her ability to earn a living in August 1988. Indeed, most of these documents were produced several years after Dr Y had died. Therefore, they were not sufficient to support her claim for Scheme benefits. Ms Y had been informed of this on several occasions, for example in

letters that the NHSBSA (and its predecessor) sent her in 1999, 2013, 2014 and 2015.

- In the statutory regulations the expression “earning his own living” was not restricted to performing the previous employment role. The natural meaning of this term was wide enough to encompass other forms of paid employment. The fact that Ms Y was not working for several years before Dr Y died in 1988 and was being financially maintained by him when he died did not necessarily mean that she was, at that time aged only 36, incapable of doing any type of paid job. It did not need to be the type of work that she had performed in the USA.
 - It was clear from the more recent medical reports supplied that, sadly, Ms Y’s health had deteriorated over the subsequent decades, due partly to various unfortunate accidents that had befallen her. However, this deterioration was not relevant for the purpose of assessing the merits of her claim as at August 1988.
 - In making her complaint to us, Ms Y made serious allegations that NHSBSA and its staff had acted towards her in an improper manner, including allegations of discrimination, corruption and collusion. Those allegations fell outside our statutory jurisdiction, which was limited to investigating alleged pension scheme maladministration. The evidence supplied by Ms Y did not support a finding of maladministration by NHSBSA.
 - The NHSBSA’s formal response to us referred to the NHS Pension Scheme Regulations 1995, but it should have referred to the NHS Superannuation Scheme Regulations 1980 that were applicable at the date of Dr Y’s death. This error was unfortunate, but it was not critical because the unemployability test was the same. Furthermore the IDRP decisions did not cite the wrong regulations.
 - Many years had elapsed since Dr Y died. It seemed very unlikely that Ms Y would be able to obtain medical evidence in future about her ability to work at the critical time, in August 1988, in order to support her claim. However, if Ms Y did succeed in producing that evidence and submitted it to the NHSBSA she would be able to bring a new complaint to us if her claim based on the new evidence was unreasonably turned down by NHSBSA, provided that she firstly went through the Scheme’s IDRP in respect of that new claim.
 - However, there was currently insufficient medical evidence to support Ms Y’s claim.
 - Ms Y had also complained that she should have received the lump sum death benefit arising under the Scheme. However, as Ms Y was already aware, the lump sum death benefit was paid to the court-appointed administrator of Dr Y’s estate in 1990. This was consistent with regulation 13 of the 1980 Regulations (see Appendix) which provided for payment to the deceased member’s legal personal representative if he was unmarried. Therefore Ms Y had no entitlement to receive that lump sum.
 - Therefore Ms Y’s complaint should not be upheld.
46. Ms Y did not accept the Adjudicator’s Opinion, and the complaint was passed to me to consider. Ms Y and her barrister provided their further comments which do not change the outcome. I agree with the Adjudicator’s Opinion, summarised above, and

I will therefore only respond to the key points made by Ms Y and her barrister for completeness.

Ombudsman's decision

47. In her recent correspondence Ms Y made several points. Firstly, she referred to a NHS Pensions leaflet headed "Complaints and Disputes" which said that in replying to a complaint NHS staff would ensure that "there has been no breach of the 2 fundamental rules of natural justice – which are the right of appeal before a decision is taken affecting one's interest and the absence of bias on the part of the decision maker." Ms Y considered that the Adjudicator had been biased in favour of the respondent.
48. To clarify, the NHS Pensions leaflet refers to how the IDRPs should be conducted, not to this office's subsequent investigation of Ms Y's complaint. I am satisfied that during the IDRPs no bias has been shown in favour of NHSBSA. Furthermore I am satisfied that no bias in favour of the NHSBSA has been shown during this office's investigation of Ms Y's complaint to us. We act impartially and independently.
49. Under the statutory regulations in force when Dr Y died, in order to be eligible for a child allowance, Ms Y had to be (1) financially dependent on the deceased member when he died and (2) at that time and at all times since then, prevented by ill health from earning her own living. NHSBSA concluded on the evidence supplied by Ms Y that she satisfied the financial dependency requirements, but did not satisfy the unemployability test. Therefore no child allowance was payable under the statutory regulations. I see no reason to overturn NHSBSA's decision.
50. Ms Y took the view that the expression "earning her own living" related only to her last employment. However, as the Adjudicator has explained recently to Ms Y, it is an "any employment" test, not a "last employment" test. The words should be given their natural meaning, and it would not be correct to import into the regulations restrictive words that are not there, such as "the living that she was last earning before her employment stopped".
51. Ms Y's barrister expressed the view that Ms Y could not be forced to do a job which was at a lower level than the job that she had last been doing. I agree that there was no compulsion on her to work. It was up to Ms Y whether or not she looked for alternative employment, and the level of that employment. But the fact that she was not working when Dr Y died did not automatically mean that she could not have earned any living at that time.
52. Mrs Y's barrister also said that the court orders obtained in 1994 supported her complaint: they showed that Ms Y was a dependant of Dr Y who was incapable of working. However, the fact that Ms Y was a dependant for the purposes of the inheritance legislation did not necessarily mean that she was a dependant for the purposes of the regulations governing the Scheme. Furthermore, those court orders

post-dated Dr Y's death by more than five years and did not show whether or not Ms Y could have earned any living in 1988. I do not agree with Ms Y's barrister's additional comment that the burden of proof was on NHSBSA to establish that she was incapable of alternative work: there is no premise in the regulations that a child's allowance shall be paid unless there is contrary evidence.

53. It is clear that Ms Y was told repeatedly that to support her claim she would need to provide contemporary medical evidence – that means medical evidence about her inability to earn her own living from August 1988. However, the medical evidence she provided is not contemporary – it dates from subsequent years and relates to various medical conditions, illnesses and injuries arising in the 1990s. As additional evidence Ms Y recently enclosed a CD of an X-Ray on her back. However, this is dated 2009 and is therefore irrelevant to her medical condition in 1988. In conclusion, the evidence supplied to this office does not support Ms Y's claim.
54. Lastly, Ms Y asked me to conduct an oral hearing, but as her complaint relates to the correct interpretation of the statutory regulations in the light of the medical evidence supplied I do not consider that an oral hearing would help her case.
55. I note that Ms Y has been trying unsuccessfully, for some time, to obtain a fresh medical report on her back and hand injuries and their effect on her ability to work in 1988. However, as this matter goes back many years, I do not think it fair to Ms Y and NHSBSA to delay further my determination of her current complaint. I should add that if Ms Y ever obtains a persuasive medical report and submits it to NHSBSA she will be able to bring a new complaint to us if her claim based on her new evidence is unreasonably rejected by NHSBSA, provided that she firstly goes through the Scheme's IDRP in relation to her new claim.
56. In the meantime, I do not uphold Ms Y's complaint.

Anthony Arter

Pensions Ombudsman
9 June 2017

Appendix

The NHS Superannuation Scheme Regulations 1980: SI 1980/362

Regulation 13 – Death Gratuity

“In the event of the death of

- (a) An officer...his widow if they were not judicially separated at the time of his death, or otherwise his personal representative, shall be entitled to receive from the Secretary of State a death gratuity...”

Regulation 15 - Child's allowance

“(1) Subject to and in accordance with Schedule 5 to these regulations, an allowance (in these regulations referred to as "a child's allowance") shall be payable to or for the benefit of any child to whom this regulation applies.

(2) This regulation applies to any child who

(a) is a child of a person who dies in the circumstances mentioned in regulation 13(1)(a) or (b)...and

(b) was dependent on that person, and...by reason of permanent ill health or infirmity of mind or body was at the time of the death of that person incapable...of earning his own living and has at all times subsequently remained incapable.

(3) For the purposes of this regulation...

(a) "child" includes

(i) a step-child, adopted child or illegitimate child, a child who is a brother or sister or the child of a brother or sister of the person mentioned in paragraph (2)(a) or of his spouse and the child of a child of that person...”