

## Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Pension Scheme
Respondents	NHS Business Services Authority ( <b>NHS BSA</b> )

## Outcome

1. Mrs N's complaint against NHS BSA is partly upheld. To put matters right (for the part that is upheld) NHS BSA should decide whether Mrs N should be granted the opportunity to request a reassessment for a Tier 2 pension within three years of the existing Tier 1 award.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs N's complaint is that she has been refused Tier 2 ill health pension benefits.

## Background information, including submissions from the parties

4. Regulation E2A (of 'The NHS Pension Scheme Regulations 1995') defines the Tier 1 condition as "permanently incapable of efficiently discharging the duties of that employment" (that is the member's NHS employment) and the Tier 2 condition as "permanently incapable of regular employment of like duration... in addition to meeting the tier 1 condition". "Permanently" means to age 60.
5. As relevant, regulation E2B ('Re-assessment of ill health condition determined under regulation E2A') says:  
  
    "(1) This regulation applies to a member in receipt of a tier 1 pension under regulation E2A.  
  
    (2) A member to whom this regulation applies may ask the Secretary of State to consider whether the member subsequently meets the tier 2 condition if-

(a) by notice in writing at the time of award of the pension, the Secretary of State informed the member that the member's case may be considered once within a period of three years commencing with the date of that award to determine whether the member satisfies the tier 2 condition at the date of such a consideration;  
...

6. Mrs N was a part-time paediatric Staff Nurse. Following a period of sickness absence she applied for ill health retirement in May 2012. She was then age 30.
7. Her initial application and stage 1 appeal (through the Scheme's two-stage internal dispute resolution (**IDR**) procedure) were turned down on the grounds that there was sufficient time to complete various treatments which on balance would enable her to return to her NHS role before age 60.
8. Mrs N's stage 2 appeal was triggered by her MP. The new medical evidence considered comprised a letter from her GP (Dr C) and copy correspondence from Mrs N's treating physicians. Dr C, among other things, said:
  - whilst Mrs N's conditions were individually manageable; and on their own it would be expected that if not a full recovery some control over her symptoms due to medication, the way the conditions interacted made it difficult to say how this would affect her in the future.
  - Her fibromyalgia and CHS were chronic illnesses that could improve with time but there could also be relapses and flare-ups.
  - He expected her gynaecological symptoms to improve when she was post-menopausal, if not before then.
  - Her lupus symptoms seemed to be currently improving and should not prevent her from working in the future.
9. The Medical Adviser for Atos (the Scheme's Medical Adviser) gave their opinion to NHS BSA that Mrs N satisfied the Tier 1, but not the Tier 2 condition:
  - Mrs N's GP had advised that she had multiple conditions (IBS, Endometriosis, Sub cutaneous Lupus Erythematosis, Depression and CFS) for which she was attending relevant specialists.
  - The conditions seemed to have eventual remedies, but once treated Mrs N would have residual Fibromyalgia and CFS. Therefore, on the balance it was unlikely that she could return to her NHS role.
  - However the Tier 2 condition was not satisfied because once Mrs N's gynaecological and connective tissue conditions were treated her health would improve sufficient for her to be able to undertake a less demanding part-time role before age 60.
  - There was ample time for all appropriate treatments to take place.

10. NHS BSA accepted Atos' opinion and awarded Mrs N Tier 1 benefits.
11. Among other things Mrs N says she has received all treatment options for her gynaecological and connective tissue conditions (except a hysterectomy), but with no improvement. She says a hysterectomy would not improve and could worsen her health. She says these and her other conditions will affect her whole future and leave her unable to carry out any regular employment.
12. NHS BSA say they have properly considered N's application.

### **Adjudicator's Opinion**

13. Mrs N's complaint was considered by one of our Adjudicators who concluded that further action was required by NHS Pensions. The Adjudicator's findings are summarised briefly below:
  - NHS BSA had complied with the Scheme's Regulations, considered all of the relevant evidence and made a proper decision.
  - A difference of medical opinion between Atos and Mrs N's treating doctors was not sufficient for the Ombudsman to say that NHS BSA's decision to accept the opinion of Atos (who are experts in occupational health) was perverse.
  - However, NHS BSA had not given Mrs N the opportunity to request a review for a Tier 2 pension within three years of the Tier 1 decision – advice on this was missing from Atos' opinion (at IDR stage 2) and NHS BSA did not appear to have given the matter any consideration.
  - Atos' opinion was that Mrs N's conditions "seemed to have eventual remedies" (with the exception of residual Fibromyalgia and CFS) which would enable her to undertake a less demanding role before age 60 – in other words the outcome was contingent upon Mrs N responding well to the treatments (she was not able to undertake regular work of like duration when she was awarded Tier 1). As this seemed to be one of the reasons why there is an option to review – to evaluate a response to treatment – NHS BSA should have asked Atos for their opinion on this and then considered the matter.
14. Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N provided her further comments which have been taken into account. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs N for completeness.

## **Ombudsman's decision**

15. My role in this matter is not to decide whether Mr N is entitled to ill health retirement - that is for NHS BSA to decide in consultation with their Medical Advisers. Also, it is not for me to agree or disagree with any medical opinion.
16. My role is to decide whether NHS BSA have correctly applied the Scheme's Regulations, considered all of the relevant evidence (it is for the NHS BSA to decide what weight, if any, to attach to that evidence) and make a decision which is not perverse. By perverse, I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.
17. I am satisfied that NHS BSA have abided by the Scheme Regulations and considered all of the relevant evidence.
18. As the Adjudicator said, a difference of medical opinion between Atos and Mrs N's treating doctors is not sufficient for me to say that NHS BSA's decision was perverse.
19. Mrs N says she was not seen by Atos, but that was a matter for Atos to decide if necessary. Clearly they did not think it was required and that they had sufficient medical evidence to give their opinion.
20. Mrs N says since the Tier 1 decision she has had her ovaries removed, her consultant has not recommended a complete hysterectomy and she has seen an urologist who has confirmed that she has painful bladder syndrome which has now become painful pelvis syndrome. She says she spends most of her time in bed and has been assessed for adaptations to her home. She says she has been offered full care and meals by social services and that her conditions are not something that will improve.
21. Of course Mrs N is applying the benefit of hindsight. This is not relevant as NHS BSA's decision was based on the medical evidence pertaining to Mrs N's health at the time of her application for ill health retirement.
22. However, as Atos' opinion was contingent on a favourable response to suggested treatments NHS BSA should have considered whether it was appropriate to grant Mrs N the opportunity to request a reassessment with three years of the Tier 1 award. Both NHS BSA and Mrs N now accept that.
23. Therefore, I partly uphold Mrs N's complaint.

**Directions**

24. NHS BSA shall within 28 days of the date of this decision notify Mrs N whether she has been granted the opportunity to request a reassessment for a Tier 2 pension within three years of the existing Tier 1 award.

**Anthony Arter**

Pensions Ombudsman  
2 June 2016