

## Ombudsman's Determination

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

## Outcome

1. I do not uphold Mrs R's complaint and no further action is required by the NHS Business Services Authority.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs R has been awarded tier 1 ill health retirement benefits. She believes she should have received tier 2 benefits because of the nature of her illness.

## Background information, including submissions from the parties

### Background

4. Mrs R applied for ill health retirement in November 2014. She was employed as a part-time (30 hours per week) District Nurse.
5. At the time Mrs R's employment ceased, the National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended) applied. Extracts from the relevant regulations are provided in Appendix 2.
6. Mrs R's application was accepted and the NHS BSA's medical advisers (OH Assist) wrote to her, on 1 December 2014, informing her of this. OH Assist said their medical adviser had considered Mrs R's occupational health records; a letter from her consultant orthopaedic knee and hip surgeon (Mr Davidson) dated 21 August 2014; a letter from a consultant orthopaedic knee surgeon (Mr Taylor) dated 16 July 2014; a letter from a physiotherapist (Miss Houghton) dated 20 June 2014; and a letter from Mrs R's GP dated 16 October 2014. A summary of the medical evidence is provided in Appendix 1.

7. Mrs R submitted an appeal for tier 2 benefits under the internal dispute resolution (IDR) procedure. Her case was reviewed by another of OH Assist's medical advisers and a deciding officer for NHS BSA. The deciding officer wrote to Mrs R, on 24 February 2015, informing her that they were unable to accept her application for tier 2 benefits. The deciding officer quoted the advice provided by OH Assist's medical adviser and said she could see no reason to disagree with his conclusions.
8. Mrs R submitted a further appeal. Her case was reviewed by a medical adviser for OH Assist and the NHS BSA. The NHS BSA wrote to Mrs R, on 15 April 2015, declining her appeal. They said the medical adviser had concluded that she did not satisfy the tier 2 condition set out in regulation E2A and they had decided to accept this view. They then quoted from their medical adviser.
9. Following the second stage IDR decision, Mrs R was assessed by another consultant orthopaedic surgeon, Mr M. He provided a report on 18 May 2015.
10. In response to Mrs R's application to the Pensions Ombudsman, the NHS BSA referred (amongst other things) to the definition of "appropriate medical treatment" in regulation E2A. They said this had been considered by their medical advisers at each stage of Mrs R's application. Having seen the formal response provided by the NHS BSA, Mrs R submitted a copy of a report provided by a consultant orthopaedic surgeon, Mr Manning, in May 2015. This report was provided at the request of an insurance company.

**Mrs R's submission**

11. Mrs R says she is unable to work. She says that the reason she was awarded tier 1 benefits was because the NHS BSA thought she was going to have surgery on her knees and hip, but she has been discharged by her consultant. Mrs R has explained that her consultant does not wish to perform the surgery because he believes it would make her condition worse. She says she has seen numerous orthopaedic specialists over the past two years who have all said that she needs replacement joints. She has been told that she has the knees of an 80 year old. However, her consultant has said he will not operate because she has hypermobile joint syndrome. Mrs R says she saw an orthopaedic surgeon in March 2015 and he is of the view that she will never be able to work for 30 hours per week. She says he expressed the view that she would only be able to manage a couple of hours per day if she had four successful joint replacements.
12. Mrs R has explained that she has only ever been a nurse and, to pursue a different career, would require retraining. She says she cannot sit or stand for long and requires help with her personal care. She says her husband has to look after their young children and do a lot of the housework and shopping.
13. Mrs R has suggested that, since the NHS BSA have acknowledged that she cannot work until she has surgery, she should receive tier 2 benefits until then.

**Submission from the NHS BSA**

14. The NHS BSA's submission is summarised below:

- They are of the view that they have properly considered Mrs R's application, taking into account and weighing up all of the relevant evidence, and taking nothing irrelevant into account. They have taken advice from appropriate sources; that is, the Scheme's medical advisers.
- They accept that Mrs R meets the tier 1 condition. It was then necessary to consider whether or not she met the tier 2 condition. All the decision makers considered that, on the basis of the medical evidence, at some point before her 60<sup>th</sup> birthday, Mrs R would be capable of regular employment of like duration.
- The medical advisers' recommendations and rationales were founded on a correct interpretation of the relevant regulations and took into account relevant evidence.
- The issue of appropriate medical treatment has been carefully considered. Their medical advisers identified appropriate medical treatment which it would be reasonable for Mrs R to receive and which would improve her condition sufficiently for her to return to regular employment of like duration. The fact that Mrs R does not agree with the conclusions drawn does not mean the decision was flawed.

**Adjudicator's Opinion**

15. Mrs R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the NHS BSA. The Adjudicator's findings are summarised briefly below:

- In coming to the initial decision not to award tier 2 benefits, the decision maker (OH Assist) had applied the correct eligibility test. He had given due regard to the factors specified in the regulations. He had reached a decision in accordance with the relevant regulations.
- On appeal, the OH Assist advisers were of the opinion that Mrs R was not, at that time, fit for any work. However, they were of the view that, with treatment (joint replacement), she would be fit for less physically demanding work of like duration. This view was not contradicted by the available evidence from Mrs R's consultant. He had said he was reluctant to undertake surgery at that time, but had not ruled it out in the future.

- There was no reason why the NHS BSA should not have relied on the advice they received from OH Assist.
  - There was no provision within the regulations for Mrs R to receive tier 2 benefits until such time as she had joint replacement surgery.
16. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs R provided her 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 Mrs R for completeness.

### **Ombudsman's decision**

17. Mrs R disagrees with the decision not to award tier 2 benefits because she says she has been told that she will never be offered joint replacement surgery. She points out that the decision was based upon the premise that she will have surgery at some time in the future and that this will enable her to undertake work of like duration (30 hours).
18. Mrs R has referred to her consultation with a consultant orthopaedic surgeon, Mr Manning, in March 2015. She says he expressed the view that she would only ever be able to manage a couple of hours of work per day and then only if she has successful joint replacement surgery. Mr Manning provided a report in May 2015. In determining whether a decision has been taken in a proper manner, I would normally only consider the evidence which was available at the time the decision was taken. The exception to this is if I consider there was further evidence which could/should have been obtained at the relevant time. Since the decision makers had a report from Mrs R's consultant which addressed the relevant issues, I do not find that they should have sought further specialist advice.
19. Having said this, I note that Mr Manning expressed the view that Mrs R was likely to "become a candidate for total knee replacement" in due course. He noted that Mrs R also had moderate disease of both hips and in time (5-10 years) she would need bilateral sequential hip replacements. He thought that, with joint replacement surgery, Mrs R would be able to return to desk based nursing. Mr Manning concluded that Mrs R was, at that time (that is, without surgery), capable of desk based light activities perhaps on a part time basis.
20. I have no reason to doubt Mrs R's account of what she has since been told; that is, her consultant will not operate because of her hypermobile joints. However, at the time of the decision to award tier 1 benefits, the medical evidence did not suggest this to be the case. Mr Davidson had expressed a reluctance to undertake surgery at that time but it had not been ruled out in the future. On that basis, I do not find that the decision was inconsistent with the available medical evidence.

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21. Therefore, I do not uphold Mrs R's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman

24 August 2016

## Appendix 1

### Medical evidence

#### ***Miss Houghton (physiotherapist), 20 June 2014***

22. In a letter addressed to Mrs R's orthopaedic consultant, Miss Houghton said Mrs R had reported a 10 year history of intermittent knee pain. She said Mrs R had sustained an avulsion fracture to her right tibia, together with ligament damage in her foot and ankle, in January 2014. Miss Houghton reported an improvement of 85% in Mrs R's ankle symptoms since then. She said Mrs R had reported a sudden worsening of pain in her right knee. She provided a description of Mrs R's symptoms; including a constant ache in both knee joints, pain aggravated by bending, kneeling or walking, and clicking and locking in both knees. Miss Houghton said Mrs R's symptoms hindered her function and disturbed her sleep. She referred to a recent x-ray report and said this showed moderate to severe degenerative changes and the presence of osteophytes. Miss Houghton then described the results of her assessment of Mrs R. She said she had offered Mrs R physiotherapy but she was receiving this through her work. She said she had offered Mrs R a cortisone injection but Mrs R wished to speak to an orthopaedic consultant.

#### ***Mr Taylor (consultant orthopaedic knee surgeon), 16 July 2014***

23. In a letter to Mr Davidson, Mr Taylor gave a brief history of Mrs R's knee problems and went on to say,

"Clinically today, she has a mild stiff knee gait and there is marked stiffness in her left hip ... I have x-rayed her pelvis today, which does confirm ... degenerative changes in her left hip ... I have had a lengthy discussion with her today, and ultimately she is likely to require some form of knee replacement surgery. I have emphasised that the indication for this is to relieve pain, and not to allow her to restore kneeling and squatting. I have also explained that it would be reasonable to consider an injection, particularly if she had a flare up with swelling. I do not think she will benefit from any soft tissue procedure ..."

#### ***Mr Davidson (consultant orthopaedic knee and hip surgeon), 21 August 2014***

24. In a letter to Mrs R's GP, Mr Davidson said he had reviewed Mrs R and noted she had bilateral patellofemoral osteoarthritis, early osteoarthritis in her left hip, and was complaining of sciatica. He said,

"The options for her knees are fairly limited. Predictably, Mr Taylor didn't feel that any soft tissue realignment would be of any benefit. I x-rayed her patellofemoral joints today and this shows bone on bone in the lateral facets.

I injected both of her knees ... to see if we can control her pain. I have encouraged her strongly to continue with her exercises. I will review her again in four months' time."

***Mrs R's GP, 16 October 2014***

25. Mrs R's GP said she had presented to the surgery, in June 2014, with right knee pain following the fracture of her tibia in January 2014. She provided copies of clinical letters relating to Mrs R's consultation with Mr Davidson and Mr Taylor. She also said Mrs R had been referred to occupational therapy for consideration of walking aids. The GP said Mrs R had also developed symptoms consistent with sciatica and had been referred for an MRI scan. She did not have the results of this. With regard to a return to work in the future or ill health retirement, the GP said Mrs R had received chronic diagnoses but the long-term outcome of treatment options was yet to be seen.

***OH Assist, November 2014***

26. The first of OH Assist's medical advisers said,

"It is more likely than not that [Mrs R's] current pain and mobility problems will improve with such treatment before normal benefit age. However she is unlikely to recover sufficient musculoskeletal resilience, even with such treatment, to successfully meet the demands of her NHS role, between now and normal benefit age, and, at the same time remain well.

It is considered that the evidence indicates that this member is, on the balance of probabilities, permanently incapable of the duties of the NHS employment. The Tier 1 condition is met.

She is more likely than not to recover sufficient overall health, function and resilience to successfully return to less physically demanding, regular employment, 30 hours per week, before normal benefits age, with the above treatments. This is especially if such employment is in a single venue with good ergonomic arrangements, does not require her to kneel and squat and allows regular changes of posture (to do varied tasks).

Due regard has been given to the member's physical capacity, mental capacity, previous training, experience, type and period of rehabilitation and type and period of training that may be undertaken.

It is considered that the evidence does not indicate that this member is, on the balance of probabilities, permanently incapable of regular employment of like duration. The Tier 2 condition is not met.

There is insufficient uncertainty regarding functional prognosis. The member may not request reassessment of the Tier 2 condition once within three years

of the date of notification of award ... On requesting any such reassessment the onus would have rested with the member to provide supporting evidence.”

27. The treatment referred to by the medical adviser was knee replacement surgery, analgesia, physiotherapy and specialist pain management services.

***Mr Davidson, 10 December 2014***

28. In a letter to Mrs R’s GP, Mr Davidson said he had reviewed Mrs R. Amongst other things, he noted she had not had any benefit from the injections previously given. He said,

“[Mrs R] came to clinic today with a rollator. As you know she is only 40 years of age and I would be a little reluctant to embark on joint replacement on someone with hypermobile arthritis joints who is so young. She is also complaining of some sciatica although I note her MRI scan has failed to demonstrate any evidence of nerve root impingement.

I have referred her to the physiotherapist to work on her VMO muscles and see whether increasing the tone in her quads off loads some of the pressure in the patellofemoral joint and improve her symptoms. I will review her following this.”

***Mrs R’s GP, 5 January 2015***

29. In an open letter, Mrs R’s GP referred to Mr Davidson’s letter and enclosed a copy. She said Mrs R had severe patellofemoral osteoarthritis and Mr Davidson was not keen to proceed to joint replacement. The GP said Mrs R was unable to kneel or squat and, whilst physiotherapy might improve her symptoms, she was not able to return to district nursing where she would have to be able to kneel and squat frequently.

***OH Assist, February 2015***

30. The second OH Assist medical adviser said he had seen a letter from Mrs R’s GP, dated 5 January 2015; a letter from the orthopaedic clinic, dated 10 December 2014; and Mrs R’s appeal submission. He agreed that the tier 1 condition had been met and that the tier 2 condition had not been met. The medical adviser acknowledged that Mrs R was currently unfit for any work because of severe pain in her knees and left leg pain (thought to be referred pain from her left hip). He noted that Mrs R had said she had had a number of adaptations to her home. He noted that she was attending aquafit and physiotherapy sessions, but these were exacerbating her symptoms. The medical adviser said Mrs R had requested tier 2 benefits at least until she had joint replacement surgery. He noted that this was to be considered when she reached age 48.
31. The medical adviser noted that the ill health retirement criteria required applicants to be permanently incapable of regular employment of like duration. He said this meant



that Mrs R would have to remain unfit for such employment until her 60<sup>th</sup> birthday in just over 19 years' time. The medical adviser concluded,

"In my opinion, on the balance of medical probabilities, she will be fit for sedentary/semi-sedentary regular employment of like duration, having regard for her knowledge, skills, training and experience following her joint replacements and before her 60<sup>th</sup> birthday."

32. The medical adviser also advised that Mrs R not be allowed to request a reassessment under regulation E2B. He acknowledged that, in the long term, Mrs R's arthritis would cause progressively increasing disability, but said it was amenable to effective surgical treatment which was unlikely to take place in the following three years.

***OH Assist, April 2015***

33. The third OH Assist medical adviser noted that Mrs R had been diagnosed with severe bilateral knee arthritis and left hip arthritis. He noted that she had a history of congenital hip dislocation, patellar dislocation and an ankle fracture. He noted that she had received knee joint injection therapy and physiotherapy. The medical adviser said the specialist opinion was that joint replacement surgery would be required but would not be considered until Mrs R was at least 48 years of age.
34. The medical adviser acknowledged that Mrs R had severely impaired mobility and was unlikely to achieve sufficient musculoskeletal resilience to cope with the demands of her nursing role.
35. The medical adviser noted that Mr Davidson was not keen to proceed with replacement surgery because of Mrs R's age and hypermobile joints. He noted an opinion from her GP to the effect that, with physiotherapy, her symptoms might improve but she would not be able to kneel or squat. The medical adviser referred to Mr Taylor's opinion that Mrs R would need some form of knee replacement surgery to relieve her pain but that she would not regain the ability to kneel or squat. He went on to say,

"It is reasonable to anticipate that with such surgery to knee and hip there will be significant improvement in functional capacity and this this would enable her to cope with the demands of a part time (30 hours per week) mainly sedentary work role of a suitable type, with appropriate adjustments as required in view of the medical condition. With improved symptoms control there would not be the requirement for strong analgesia. It is advised that although surgery may be delayed till [*sic*] clinically indicated on grounds of symptoms severity and degree of disability, there is sufficient time for surgery and recovery in the period under consideration – the next 18 years."

36. The medical adviser recommended that reassessment in the following three years should not be allowed because, although Mrs R's arthritis would cause progressively

increasing disability, it was amenable to surgical treatment which was unlikely to take place within the following three years.

***Mr Manning (consultant orthopaedic surgeon), 18 May 2015***

37. Mrs R has provided a copy of Mr Manning's report dated 18 May 2015. This report was not available to NHS BSA at the time of the decision to award tier 1 benefits or the subsequent appeal. It has not, therefore, been summarised here.

## Appendix 2

### **The National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended)**

38. At the time Mrs R's employment ceased, regulation E2A provided,

- “(1) This regulation applies to a member who -
  - (a) retires from pensionable employment on or after 1st April 2008;
  - (b) did not submit Form AW33E (or such other form as the Secretary of State accepted) together with supporting medical evidence if not included in the form pursuant to regulation E2 which was received by the Secretary of State before 1st April 2008, and
  - (c) is not in receipt of a pension under regulation E2.
- (2) A member to whom this regulation applies who retires from pensionable employment before normal benefit age shall be entitled to a pension under this regulation if -
  - (a) the member has at least 2 years qualifying service or qualifies for a pension under regulation E1; and
  - (b) the member's employment is terminated because of physical or mental infirmity as a result of which the member is -
    - (i) permanently incapable of efficiently discharging the duties of that employment (the "tier 1 condition"); or
    - (ii) permanently incapable of regular employment of like duration (the "tier 2 condition") in addition to meeting the tier 1 condition.

...

- (14) For the purposes of determining whether a member is permanently incapable of regular employment under paragraph (2)(b)(ii), the Secretary of State shall have regard to the factors in paragraph (16) (no one of which shall be decisive) and disregard the factors in paragraph (17).

...

- (16) The factors to be taken into account for paragraph (14) are
  - (a) whether the member has received appropriate medical treatment in respect of the incapacity; and

- (b) such reasonable employment as the member would be capable of engaging in if due regard is given to the member's -

- (i) mental capacity;
- (ii) physical capacity;
- (iii) previous training; and
- (iv) previous practical, professional and vocational experience,

irrespective of whether or not such employment is actually available to the member;

- (c) such type and period of rehabilitation which it would be reasonable for the member to undergo in respect of the member's incapacity (irrespective of whether such rehabilitation is undergone) having regard to the member's-

- (i) mental capacity, and
- (ii) physical capacity:

- (d) such type and period of training which it would be reasonable for the member to undergo in respect of the member's incapacity (irrespective of whether such training is undergone) having regard to the member's-

- (i) mental capacity,
- (ii) physical capacity,
- (iii) previous training, and
- (iv) previous practical, professional and vocational experience, and

- (e) any other matter which the Secretary of State considers appropriate.

- (17) The factors to be disregarded for paragraph (14) are -

- (a) the member's personal preference for or against engaging in any particular employment; and
- (b) the geographical location of the member.

- (18) For the purpose of this regulation -

"appropriate medical treatment" means such medical treatment as it would be normal to receive in respect of the incapacity, but does not include any treatment that the Secretary of State considers -

- (a) that it would be reasonable for the member to refuse,
- (b) would provide no benefit to restoring the member's capacity for -
  - (i) efficiently discharging the duties of the member's employment under paragraph (2)(b)(i), or
  - (ii) regular employment of like duration under paragraph (2)(b)(ii),before the member reaches normal benefit age; and
- (c) that, through no fault on the part of the member, it is not possible for the member to receive before the member reaches normal benefit age;

"permanently" means the period until normal benefit age; and

"regular employment of like duration" means -

...

- (b) in all other cases, where prior to retiring from employment that is pensionable the member was employed -
  - (i) on a whole-time basis, regular employment on a whole-time basis;
  - (ii) on a part-time basis, regular employment on a part-time basis,

regard being had to the number of hours, half-days and sessions the member worked in that employment."

**39. Regulation E2B provided,**

- "(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;

- (b) the member provides further medical evidence to the Secretary of State relating to the satisfaction of the tier 2 condition at the date of the Secretary of State's consideration and that further medical evidence is provided -
  - (i) in the case of a member who does not engage in further NHS employment during the three year period referred to in (a), before the end of that period;
  - (ii) in the case of a member who does engage in further NHS employment during the three year period referred to in (a), before the first anniversary of the day on which that employment commences or before the end of that period if sooner,
- (c) that further medical evidence relates to the same physical or mental infirmity that qualified the member for the member's tier 1 pension;
- (d) the member has not become entitled to a tier 2 pension in respect of any later service under regulation S3A(6); and
- (e) the member is not -
  - (i) a 2008 Section Optant within the meaning of regulation 2.K.1 or 3.K.1 of the 2008 Section of the Scheme, or
  - (ii) a Waiting Period Joiner within the meaning of regulation 2.L.1 or 3.L.1 of the 2008 Section of the Scheme,who has become entitled to a tier 2 ill-health pension under regulation 2.D.8 or 3.D.7 of that Section.

- (3) If, after considering the further medical evidence provided by a member, the Secretary of State determines that the member satisfies the tier 2 condition -
  - (a) the Secretary of State shall pay from the date of that determination a tier 2 pension under regulation E2A(2) in place of the tier 1 pension being paid to that member; and
  - (b) that pension shall be calculated in accordance with paragraph (4) of regulation E2A and as if that paragraph included the words

"from the date of the Secretary of State's determination under regulation E2B" after "employment".

- (4) Only one consideration of a member's case may be undertaken under this regulation."