

Ombudsman's Determination

Applicant	Mr B
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Service Authority (NHS BSA)

Outcome

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

Complaint summary

3. Mr B's complaint is that NHS BSA rejected his late father's application to commute his ill-health retirement benefits into a lump sum payment.

Background information, including submissions from the parties

4. Having been diagnosed with bowel cancer, Mr B's father, the late Mr B, applied to NHS BSA for early release of his preserved pension benefits in July 2013. Since he had indicated that his life expectancy was under one year, NHS BSA forwarded the form to its medical advisers.
5. NHS BSA wrote to the late Mr B on 15 August 2013 to tell him that his application had been accepted. A form AW8P ("Application form and guidance notes to claim deferred benefits") was enclosed to enable him to claim the ill-health pension. Part 3.1 of the guidance notes explained that the benefits could be commuted into a lump sum payment if the member was terminally ill. In order to do this, they had to enclose a completed form AW341 ("Application to commute ill-health retirement benefits") when they returned the form AW8P. The guidance notes explained that this form was available to download from the Member Forms section of NHS BSA's website.
6. The late Mr B signed and dated the form AW8P on 17 August 2013.
7. Sadly, the late Mr B passed away on 19 August 2013, before the form AW8P was returned to NHS BSA.
8. Mr B sent his late father's completed form AW8P to NHS BSA on 17 October 2013.

9. NHS BSA wrote to Mr B on 16 December 2013 to tell him that it was unable to commute the late Mr B's ill-health retirement benefits into a lump sum because he had not completed form AW341. However, it agreed that arrears of his pension for the period 18 June 2013 up until 19 August 2013, along with the maximum tax free lump sum, would be payable. The sum of £103,604.86 was duly paid to the late Mr B's Estate. If form AW341 been completed, the estimated ill-health retirement lump sum would have been £176,732.83.
10. Dissatisfied with this response, Mr B submitted a complaint to us. He pointed out that NHS BSA knew it was the late Mr B's intention to commute his ill-health retirement benefits into a lump sum payment. He also said that, given it was aware of the late Mr B's terminal status, NHS BSA should have ensured form AW341 was enclosed with the form AW8P instead of requiring him to download and print that form. He contended that this was an unnecessarily onerous procedure to expect a terminally ill member to follow, and submitted that NHS BSA is in breach of the disability provisions of the Equality Act 2010.
11. A relevant extract from the National Health Service Pension Scheme Regulations 1995 (as amended) (**the 1995 Regulations**) is provided in Appendix 1.
12. A relevant extract from the Occupational and Personal Pension Scheme (Disclosure of Information) Regulations 1996 (as amended) (**the 1996 Disclosure Regulations**) is provided in Appendix 2.

Adjudicator's Opinion

13. Mr B's complaint was considered by one of our Adjudicators who ultimately concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised briefly below:-
 - Regulation 26(2) of the 1996 Disclosure Regulations provided that information about the Scheme may be issued to the member in a variety of ways – by letter to their last known postal address, by email, or by making it available on a website.
 - Regulation 26(3) said Scheme information cannot be given electronically where the member has provided written instructions to that effect. There was no evidence that the late Mr B had asked NHS BSA not to issue Scheme related information electronically.
 - NHS BSA provided Scheme information to the late Mr B using several methods, including referring him to its website. In relation to his application for the early release of his preserved Scheme benefits, NHS BSA sent him form AW8P; a

guidance note accompanying this form instructed him to go to the Scheme's website in order to access and complete form AW341, should he wish to commute his ill-health retirement benefits. Since the 1996 Disclosure Regulations enable NHS BSA to utilise both of these methods when issuing information to members, there was no evidence of any breach of legal rights.

- The Adjudicator also considered Mr B's argument that, in requiring the late Mr B to download form AW341 from its website, NHS BSA was imposing an onerous obligation on him which breached the disability provisions of the Equality Act 2010. He pointed out that the nature of the ill-health pension is that all applicants have a disability and, as such, the process is the same for all and not discriminatory. The Adjudicator explained that, had the late Mr B told NHS BSA that he was unable to meet the requirement to access form AW341 and complete it, due to a specific disability, then it may be that the provisions of the Act would require NHS BSA to make further reasonable adjustments at that point, but not earlier.
 - The Adjudicator did not consider there was any evidence of maladministration on the part of NHS BSA resulting in non-financial injustice (distress and inconvenience).
14. Mr B did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr B provided his 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 Mr B for completeness.
15. In summary, these are:
- Regulation 26(2) of the 1996 Disclosure Regulations states that NHS BSA may provide information by post or via electronic means; by implication, it cannot use a combination of these methods to correspond with members.
 - Regulation 26(5) of the 1996 Disclosure Regulations says that, in the case of employees who were members of the Scheme on 1 December 2010 and have not received information by means of an electronic communication before that date, information cannot be provided in this format. That is unless NHS BSA has written to the member notifying them that it proposes to provide information by way of electronic means and telling them that they may request in writing that information is not given in this format. As far as he is aware, the late Mr B had not received information from NHS BSA in any electronic format prior to 1 December 2010, and there is no evidence that NHS BSA wrote to him around this time to tell him that it intended to furnish information electronically in the future.
 - NHS BSA knew that the late Mr B was terminally ill and, in this circumstance, it had a moral obligation to ensure its processes were as straightforward as possible. In addition, Regulation 26(4)(b) provides that information may only be given in

electronic form where NHS BSA has taken into account the requirements of disabled members. Terminally ill people do not have the time, strength or ability to trawl through complicated processes, and requiring them to download and print form AW341 places an onerous obligation on them.

- Regulation L1(6) of the 1995 Regulations says, “A lump sum payment under paragraph (5) may be made only if the Secretary of State is satisfied that it is appropriate in all the circumstances, having regard to the life expectancy of the member and [sic] the member was in pensionable employment on or after the coming into force of these Regulations”. The late Mr B’s terminal illness had been confirmed by medical practitioners and he was in pensionable employment when the 1995 Regulations came into force. In the spirit of what Regulations L1(6) is intended to achieve, it is unlikely that the Secretary of State would not reach the conclusion that the late Mr B would be entitled to be paid a lump sum simply on the basis that he had not completed the supplementary form AW341.

Ombudsman’s decision

16. The 1996 Disclosure Regulations are focused on the provision of information, with the objective of ensuring members do not miss out on receiving important communications. This is on the basis that, if NHS BSA makes a change that affects a member, it needs to make sure they can reasonably become aware of it. It does not follow that all *forms* that might potentially need to be completed by a member have to be physically posted to them. Nor does it imply that members can only be referred to a website to obtain a form where they have agreed to this. Accordingly, I do not agree with Mr B’s interpretation of the meaning of Regulation 26.

17. I cannot overlook that NHS BSA provided the late Mr B with form AW8P, along with the guidance notes, in writing. Under “Part 3: Type of Pension and Retirement Lump Sum”, the guidance notes state:-

“Commuted early payment of deferred benefits on ill-health grounds.

Your ill-health retirement benefits can be paid as a one off lump sum if you are terminally ill. Remember to attach a form AW341, which you can get from the Member Forms section of the website at: www.nhsbsa.nhs.uk/pensions”.

18. In my judgment, this makes it sufficiently clear that form AW8P had to be accompanied by form AW341 if a member wanted to commute their ill-health retirement benefits into a lump sum. The guidance notes also direct the member to the relevant page of the NHS BSA website in order to download that form.

19. Moreover, under “Part 3 – Type of Pension and Retirement Lump Sum”, form AW8P contains a tick box which says, “Commuted early payment of pension benefits based on ill-health grounds (attach form AW341)”. As such, there is a reminder on form

AW8P itself that members seeking to commute their ill-health retirement benefits into a lump sum payment need to submit a completed form AW341 alongside that form.

20. Furthermore, NHS BSA has explained that, although it discloses the option to commute ill-health retirement benefits, it does not wish to be seen to be encouraging members to do so where the terminal nature of the illness may not be known to them. As a result, the decision as to whether to commute the ill-health retirement benefits is left to the member to make, using the information provided in Scheme booklets and on the website. I do not consider this to be an unreasonable approach to take.
21. I accept that it is possible the late Mr B could have completed form AW341 before he passed away if NHS BSA had enclosed it with form AW8P. But the fact that NHS BSA did not do so does not constitute maladministration. Nor does it comprise a breach of the Equality Act 2010, since all members applying for commutation of an ill-health retirement pension will necessarily have a disability, and the process is the same for all applicants.
22. Ultimately, unfortunately, the late Mr B was unable to complete form AW341 for a variety of reasons, including the need to obtain a report from his specialist and the fact that he passed away the day after he filled in form AW8P. Much as I sympathise, I find no evidence of maladministration by NHS BSA.
23. Therefore, I do not uphold Mr B's complaint.

Anthony Arter

Pensions Ombudsman
28 June 2017

Appendix 1

The NHS Pension Scheme Regulations 1995

24. Regulation L1(5) provides:-

“(5) Subject to paragraph (6), where on or after the coming into force of these Regulations a member becomes entitled to a pension under paragraph (3) (a) or (b), the Secretary of State may discharge her liability for that pension by the payment of a lump sum of an amount consistent with-

(a) the contracting-out and preservation requirements of the 1993 Act; and

(b) the lump sum rule”.

25. Regulation L1(6) says:-

“(6) A lump sum payment under paragraph (5) may be made only if the Secretary of State is satisfied that it is appropriate in all the circumstances, having regard to the life expectancy of the member and the member was in pensionable employment on or after the coming into force of these Regulations”.

Appendix 2

The Occupational and Personal Pension Scheme (Disclosure of Information) Regulations 1996 (as amended)

26. Regulation 26 states:-

“**26.**—(1) Except where these Regulations otherwise provide, the methods for giving information or documents that these Regulations require to be given include the methods set out in paragraph (2).

(2) The information may be given by—

(a) sending it to the person's last known postal address, or

(b) subject to paragraphs (3) to (5), using either or both of the following methods—

(i) sending it to the person's last known electronic address, or

(ii) making it available on a website (see regulation 27).

(3) Where a member or beneficiary of the scheme has requested in writing that—

(a) any of the information, or

(b) all of the information,

is not given in accordance with paragraph (2)(b), that information may not be given in accordance with paragraph (2)(b).

(4) Information may only be given by an electronic communication where the trustees or managers of the scheme are satisfied that the electronic communications have been designed—

(a) so that the person will be able to—

(i) get access to, and

(ii) store or print,

the information, and

(b) taking into account the requirements of disabled persons.

(5) Where—

(a) a member or beneficiary of the scheme was a member or beneficiary of the scheme on 1st December 2010, and

(b) information was not given by the trustees or managers of the scheme before that date by the methods described in paragraph (2)(b),

information may not be given to that member or beneficiary of the scheme in accordance with paragraph (2)(b) unless the trustees or managers of the scheme have given them the written notice referred to in paragraph (6).

(6) The written notice mentioned in paragraph (5) must state that—

(a) the trustees or managers of the scheme propose to give information to the member or beneficiary of the scheme by means of an electronic communication, and

(b) the member or beneficiary of the scheme may request in writing that information is not given by means of an electronic communication.

(7) The written notice mentioned in paragraph (5) must not be given by the methods mentioned in paragraph (2)(b)".