

Ombudsman's Determination

Applicant	Ms R
Scheme	NHS Pension Scheme
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Ms R's complaint and no further action is required by NHS BSA
2. Ms R's complaint against NHS BSA is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) NHS BSA should pay Ms R £500 for the significant distress and inconvenience that she has experienced.
3. My reasons for reaching this decision are explained in more detail below.

Complaint summary

4. Ms R's complaint against NHS BSA is that she has been refused Tier 2 ill health benefits under Regulation E2A of The National Health Service Pension Scheme Regulations 1995.
5. Ms R requests that the matter should be put right by NHS BSA finding that she is eligible for Tier 2.

Background information, including submissions from the parties

6. Ms R injured her knee as a result of a trip outside a bank in mid-2009. Ms R applied for ill health retirement from her role as a health care assistant with the NHS as a result of her knee injury. On 5 July 2010, the NHS BSA advised Ms R that she had not been accepted for ill health retirement on either Tier 1 or Tier 2. The application was declined on the grounds that Occupational Health had advised that
 - Physiotherapy had been arranged, however it was likely to take several months before any benefit was seen.
 - Arthroscopic interventions may be offered.
 - Further therapeutic measures may be used before age 60. Ms R was currently 53.

7. In October 2010, Ms R was dismissed from her role as a NHS health care assistant on grounds of ill health. The arguments in support of this were;
 - Ms R had been continually absent and unfit to return to normal duties since March 2009.
 - Ms R continued to be unfit for return to work in any capacity for the foreseeable future.
 - Even if there was a procedure that was successful there would be several months' rehabilitation before return to work in any capacity as advised by Occupational Health.
 - Ms R had a further fall which prevented discussion with her manager for re-training possibilities.
8. On 1 February 2013, Ms R's solicitor raised a subject access request with NHS BSA. Their letter indicates that Ms R was awaiting a decision regarding her ill health retirement. Documentation relating to the ill health retirement application and outcome was requested.
9. On 26 February 2013, NHS BSA supplied the information requested to Ms R's solicitor.
10. On 18 February 2014, Ms R's solicitor appealed the decision not to award ill health retirement made on 5 July 2010, through the Internal Dispute Resolution Procedure (**IDRP**). The appeal was based on the following points:
 - Medical evidence in 2010 suggested that Ms R was suffering from degenerative changes to the right knee and that more degenerative change was likely. In a medical report from 2010, Dr Smith states that full mobility is required to carry out Ms R's role and that Ms R does not have the skills for office work.
 - The decision made in July 2010 was partly based on an assumption that arthroscopic treatment might be offered, however Ms R's specialist physician had indicated, in a letter dated 3 February 2010, that he did not feel this treatment is appropriate for Ms R.
 - The decision was also partly based on physiotherapy having a positive effect, however, Dr Smith indicated that Ms R is unlikely to regain full mobility, which is needed to carry out her role.
11. On 10 March 2014, NHS BSA issued their IDRP Stage 1 response. A further medical report was produced by a Medical Adviser, who concluded that Ms R qualified for ill health retirement under Tier 1. The decision maker commented, "I can see no reason to disagree with their conclusion and I, therefore, endorse the view that you are entitled to Tier 1 Ill Health Retirement Benefits". The decision was based on the following information available at July 2010;

- Body mass index of 32 indicating obesity, marked valgus deformity of the knee and flat arches on both feet.
 - Ms R was judged to be unlikely to regain capacity for the physical demands of her NHS role and that she does not have the skills for an office role.
 - Weight reduction and physiotherapy were recommended and it was considered that further therapeutic interventions may be used including arthroscopic surgeries.
12. The Stage 1 decision, issued on 10 March 2014, also took into account the relevant medical evidence relating to Ms R's existing condition since the initial decision made in July 2010, as follows:
- Ms R's knee did not improve with physiotherapy and she had a total knee replacement in March 2011.
 - Ms R is in receipt of Employment Support Allowance and Disability Living Allowance and is certified to be unfit for work.
13. The medical report included in the Stage 1 response states, "It is considered that the evidence confirms that this member was incapable of her NHS role, because of her right knee problem, at the time of initial application and has remained so since."
14. The medical report goes to say that, "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."
15. The medical report then addresses Tier 2. The Medical Advisor acknowledges the back pain that Ms R reported to her GP on 25 May 2011. He concludes that while Ms R stated that she had been having the symptoms of back pain for over a year, it was not sufficiently bad for her to report to either her GP, or Occupational Health physician previously, therefore it cannot be taken into account when reviewing evidence available in July 2010. The Medical Advisor then states that the, "Other conditions have arisen since then and these did not contribute to incapacity at that time."
16. The 10 March 2014 decision invited Ms R to complete a form supplied by her employer to apply for her pension to be paid under Tier 1.
17. On 9 September 2014 Ms R's solicitor appealed the decision not to award Tier 2 ill health retirement benefits. The appeal was made on the following main points;
- The decision to dismiss Ms R from employment was made in October 2010 on the basis that Ms R was not fit for employment in any capacity for the foreseeable future. However, Ms R has been declined Tier 2 ill health retirement which requires the applicant to be unfit for work of a like duration.
 - Regular employment should be considered to be shift work, which in Ms R's case, was her working patterns as a NHS health care assistant.

- Ms R's back pain should be taken into consideration as she was suffering from at the time of the original decision in 2010.
 - Ms R is considered unfit for return to work and receives Employment Support Allowance (**ESA**). Ms R is also in the ESA support group for individuals who are unlikely to return to work.
 - Ms R also receives Disability Living Allowance (**DLA**), which was applied for in early 2010 and lower rate care component and higher rate mobility component were granted in October 2010.
18. On 23 February 2015 NHS BSA issued their response to IDRP Stage 2. This stood by the decision made in IDRP Stage 1 that Tier 1 should be awarded and that Ms R did not qualify for Tier 2. The decision addressed the points raised as follows;
- The decision to dismiss Ms R from employment and the decision to award an ill health pension are different decisions and are based on different criteria. The employer need only consider immediate employment requirements whereas NHS BSA must consider capacity up to retirement age.
 - NHS BSA said, "The applicant's representative argues that as [Ms R's] employment was employed on a full time basis to do shift work; regular employment of like duration should also be considered as shift work - that is not the case."
 - Ms R's Orthopaedic Practitioner provided a report dated 31 January 2012, which clearly states that Ms R's symptoms of back pain developed one month after she had her knee replaced in March 2011.
 - Ms R was granted ESA and put in a work related activity group in June 2011. This suggests that at the time it was considered that she was likely to return to work. In March 2012 Ms R was reassessed and placed in the ESA support group which suggests that she was considered unlikely that she would be fit for work. In August 2014 Ms R was assessed again and remained in the ESA support group. The Disability Analyst, appointed by the Department for Work and BSA (DWP), confirmed that due to stroke, arthritis and asthma Ms R was considered unfit for work in the longer term. Ms R was diagnosed with asthma in 2011 but there is no medical evidence of a stroke.
 - The conditions claimed for under DLA were hypertension, mobility problems and visual impairment. Ms R was awarded lower rate care component and higher rate mobility component. The report provided to DWP by Ms R's GP, which is dated 25 October 2010, reports that her knee problem required her to use two walking sticks, a visual problem required specialist follow up and breathlessness on exertion, the current GP is not aware of any visual impairment. The Stage 2 decision maker makes clear that only conditions present when she made her initial application can be considered. There is no medical evidence that Ms R attended her GP with breathlessness, however records do indicate that she was overweight. Ms R had

received eye drops in 2009 from an eye hospital to treat an allergy. When she applied for ill health retirement the evidence suggests that she had severe knee pain, high blood pressure and was overweight.

Adjudicator's Opinion

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

- To be eligible for Tier 2 ill health benefits under Regulation E2A, Ill health pension on early retirement under the National Health Service Pension Scheme Regulations 1995, Ms R had to be;
 - permanently incapable of efficiently discharging the duties of that employment (the "tier 1 condition"); or
 - permanently incapable of regular employment of like duration (the "tier 2 condition") in addition to meeting the tier 1 condition.
- During IDRP Stage 1, in changing the decision originally made, NHS BSA has agreed that the decision issued on 5 July 2010, was incorrect. The Medical Advisor based the original decision on the possibility of treatment which the Ms R's GP had already advised was not suitable. The Medical Advisor also relied heavily on physiotherapy having a significant positive impact. It appears that all the evidence was not taken into account and this amounts to maladministration.
- This maladministration was addressed at IDRP Stage 1 and the review was reasonable. The Medical Advisor reviewed the medical evidence available at the time of the original application and also medical evidence, which came to light after the original application but was related to the original symptoms. The medical evidence submitted did not directly relate to the pre-existing conditions was deemed not relevant during the appeal.
- While the maladministration was redressed at IDRP Stage 1 there was no redress offered for the distress and inconvenience that the original incorrect decision caused Ms R. NHS BSA should pay Ms R £500 compensation for the significant distress and inconvenience that she has suffered.
- The Stage 2 IDRP looked in to the later medical evidence in further detail and concluded that this was not relevant as it was not available in 2010 when the initial decision was made. It was also confirmed that the conditions other than knee pain, hypertension and weight arose after the ill health retirement application in 2010. The arguments that ESA and DLA support Ms R's incapacity are irrelevant, as they have been granted taking into account medical conditions not relevant to Ms R's original application. No fault can be found with the Stage 2 decision.

- Dismissal from employment on the grounds of ill health does not automatically entitle an applicant to ill health retirement. Dismissal from employment is decided on different criteria, such as business needs, whereas entitlement to an ill health pension must suggest incapacity until retirement age based on medical evidence.
 - NHS BSA are correct to say that Ms R's advisors are wrong when they claim that, "regular employment of like duration" must be on a shift basis "of a like duration" simply refers to the hours worked and there is no requirement for those hours to be of a similar pattern to the NHS shift work.
 - Therefore part of this complaint should be upheld because Ms R has not been compensated for the significant distress and inconvenience she has experienced. In order to put matters right the Scheme should pay Ms R £500 compensation in respect of the significant distress and inconvenience that she has experienced.
20. Ms R did not disagree with the Opinion. Whereas NHS BSA did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHS BSA provided their further comments summarised below:
- The initial decision was based on medical evidence available at the time which suggested that further therapeutic measures may be used. Therefore, it was considered premature to consider Ms R permanently incapable of her NHS duties up to her normal retirement date. NHS do not agree that this decision was incorrect.
 - NHS BSA maintain that the medical evidence supplied at IDRP Stage 1 clearly demonstrated that Ms R was, more than likely not, incapable of her NHS employment and has remained so since.
 - NHS BSA is of the view that at IDRP Stage 1 & 2 it can consider contemporaneous evidence which came to light after the severance of the applicants NHS employment as long as it is relevant.
 - Therefore, NHS BSA do not agree to pay £500 distress and inconvenience as they refute any allegation of maladministration.
21. The comments provided by NHS BSA 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 NHS BSA for completeness.

Ombudsman's decision

22. The initial decision made on 5 July 2010 declined the application on the basis that further therapeutic measures may be used. However, the therapeutic measure suggested by the Medical Advisor was arthroscopic interventions. Ms R's specialist physician had indicated, in a letter dated 3 February 2010, that he did not feel this

treatment was appropriate for Ms R. The Medical Advisor seems to have disregarded the specialists recommendation and no explanation as to why has been provided.

23. The decision maker should have asked the Medical Advisor why a treatment that Ms R's specialist has said would not be appropriate has been used as the only example of further therapeutic measures that may be used. This implies that the medical evidence provided by Ms R's specialist was not considered, either by the Medical Advisor, the decision maker, or both.
24. The decision to grant a Tier 1 ill health pension was made on the basis that further therapeutic measures were inappropriate or unavailable and physiotherapy had not been successful. Other than the known fact that physiotherapy had been unsuccessful, it appears that the evidence that therapeutic measures were not appropriate was available at the initial decision. Therefore, I agree that the decision to grant ill health retirement at IDRP Stage 1 acknowledges that initial decision was incorrect and that Ms R should receive £500 from NHS BSA for the significant distress and inconvenience that this has caused her.
25. I agree that in remaking the decision NHS BSA are not required to look at medical evidence in respect of new conditions or deterioration of the original condition that has occurred or become available after the initial decision was made. NHS BSA did look at evidence relating to new conditions but decided that it was not relevant to the original application. However, this does not mean that NHS BSA cannot look at relevant medical evidence that became available at a later date in respect of the original condition at the time of the original decision, the decision maker should take this into account when reviewing a decision. Ultimately it is up to NHS BSA whether they accept medical evidence that became available at a later date and to decide if that evidence is relevant to the original condition.
26. Therefore, I partially uphold Ms R's complaint.

Directions

27. Within 28 days of this determination NHS BSA are to pay Ms R £500 for the significant distress and inconvenience that she suffered following the decision made on 5 July 2010.

Anthony Arter

Pensions Ombudsman
14 February 2017