PO-10582

Ombudsman's Determination

Applicant	Mrs D
Scheme	NHS Pension Scheme
Respondents	NHS Business Services Authority (**NHS BSA**)

Outcome

1. I do not uphold Mrs D'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. Mrs D has complained that her application for Tier 2 ill health retirement benefits has been declined on the basis that she was receiving ongoing treatment.

Background information, including submissions from the parties

Background

4. Mrs D was employed as a part time Health Visitor (22.5 hours per week) until July 2013.

5. At the time Mrs D's employment ceased, the NHS Pension Scheme Regulations 1995 (SI1995/300) (as amended), applied. Extracts from the relevant regulations are provided in Appendix 2.

6. Mrs D applied for ill health retirement in May 2013. Her application was initially declined, but she was awarded Tier 1 benefits on appeal.

7. Initial decisions about ill health retirement have been delegated to NHS BSA's medical advisers. At the time, this was Atos Healthcare (**Atos**). They wrote to Mrs D, on 10 June 2013, declining her application on the grounds that neither the Tier 1 condition nor the Tier 2 condition were met. Further details of Atos' decision and other medical evidence relating to Mrs D's case are provided in Appendix 1.

8. Mrs D's solicitors submitted an appeal under the internal dispute resolution (**IDR**) procedure. They provided reports from a consultant in pain management (Dr

Harrison), a consultant neurologist (Dr Fletcher), and a consultant neuropsychiatrist (Dr Foy).

9. Mrs D's case was referred back to NHS BSA's medical advisers (now called **OH Assist**) for review by another medical adviser. On 7 August 2014, NHS BSA wrote to Mrs D's solicitors saying her appeal had been successful. Mrs D was awarded Tier 1 benefits on the basis that she was permanently incapable of carrying out her NHS duties. NHS BSA quoted the advice they had received from Atos and said they could see no reason to disagree with their conclusions.

10. Mrs D submitted a further appeal and her case was referred back to OH Assist. They requested reports from Mrs D's GP and Dr Mann. On 31 July 2015, NHS BSA issued a stage two IDR decision declining Mrs D's appeal. They referred to the advice they had received from OH Assist and quoted from the medical adviser in their letter.

11. In subsequent correspondence, NHS BSA responded to Mrs D's request to have her solicitors' fees reimbursed. They said the IDR procedure was free of charge; as was referral to the Pensions Advisory Service (**TPAS**) and the Ombudsman. They also said there was no duty or obligation under the Scheme regulations for them to defray fees incurred by a member in pursuing a claim.

Mrs D's submission

12. Mrs D says a probable prognosis given by one of her doctors (Dr Manns) has been taken into account, although he has stated it is unlikely that improvement will be seen within five years of treatment. Mrs D says additional treatment, such as CBT and pain management, has concluded or is under review and she is now in the care of her GP.

13. Mrs D points out that most of the evidence considered dates back to 2013 and her state of health at this time. She feels that all the relevant facts and new medical evidence needs to be considered. She does not feel that her case has been reviewed in relation to the facts as they are now. She feels that too much emphasis has been placed on NHS BSA's procedures.

14. Mrs D has explained that she engaged a solicitor when she first appealed, having been declined for Tier 1 benefits. She says her Tier 1 appeal was successful but she was required to pay £2,400 in solicitors' fees. Mrs D says, if her pension had been awarded on first application, she would not have required a solicitor to handle her appeal.

NHS BSA's submission

15. NHS BSA submit that they have properly considered Mrs D's application. They have taken into account and weighed up all relevant evidence and nothing irrelevant. They have taken advice from appropriate sources and, having done so, they have considered and accepted this advice.

16. They accept that Mrs D meets the Tier 1 condition for ill health retirement benefits. They then considered whether she met the Tier 2 condition. Having considered the advice from their medical advisers, they concluded that Mrs D is likely to be capable of regular employment of like duration at some point before age 60.

17. Their medical advisers' recommendations and rationales were founded on a correct interpretation of the Scheme regulations, took into account relevant evidence, and was not perverse.

18. Decisions involving medical matters are seldom black and white. A range of opinions may be given by various sources; all of which must be considered and weighed. However, the fact that Mrs D does not agree with their conclusions or the weight they attached to the evidence does not mean that their decision is flawed.

Adjudicator's Opinion

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

    - The point of disagreement was whether or not Mrs D was likely to be capable of regular employment of like duration before her 60th birthday. The employment did not have to be of the same type as Mrs D's NHS employment; it could be any kind of part-time (22.5 hours per week) employment.

    - NHS BSA had based their decision to award Tier 1 benefits on the advice they had received from OH Assist. The OH Assist advisor had understood the relevant regulations correctly and there were no errors or omissions of fact in her report. The OH Assist adviser's opinion did not appear to be at odds with the opinions expressed by the doctors commissioned by Mrs D's solicitors.

    - There was no reason why NHS BSA should not have relied on the advice they received from OH Assist in coming to their decision not to award Tier 2 benefits.

    - Mrs D had asked for her solicitors' fees to be reimbursed by NHS BSA. However, the internal dispute resolution procedure, the Pensions Advisory Service and the Pensions Ombudsman Service, were all available free of charge. There were no unusual circumstances relating to Mrs D's case which would suggest NHS BSA should be required to reimburse her costs.

20. Mrs D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs D 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 D for completeness.

Ombudsman's decision

21. Mrs D has made the point that the review of her case has focussed on the state of her health in 2013. There is a good reason for this. In order to be eligible to receive Tier 2 benefits under regulation E2A, Mrs D had to meet the criteria at the time her NHS employment ceased; July 2013. Her employment had to have been terminated because of physical or mental infirmity as a result of which she was permanently incapable of regular employment of like duration. The medical evidence which is pertinent to deciding Mrs D's case is that which was available in 2013.

22. The subsequent progress of Mrs D's health is not so relevant. This is because NHS BSA had to make their decision on the basis of the likely future course of her condition. The fact that the doctors' expectations may not have come to pass is not evidence that the decision was incorrect at the time it was made. It is for this reason that obtaining up to date medical evidence does not help Mrs D's case.

23. Mrs D feels that the emphasis has been on the procedures undertaken by NHS BSA. This is because it is NHS BSA who are responsible for making the decision to pay benefits under regulation E2A. Their medical advisers, so far as their medical opinions are concerned, are not within my jurisdiction; they must answer to their own professional bodies. The question for me is whether there has been any maladministration on the part of NHS BSA. I do not find that there has been.

24. Therefore, I do not uphold Mrs D's complaint.

Anthony Arter

Pensions Ombudsman
25 October 2016

Appendix 1

The medical evidence

Dr Mann (consultant neurologist), 15 April 2013

25. In a letter to her GP, Dr Mann said Mrs D had noticed some relief from medication with no side effects. He said Mrs D described her muscle spasms as not being as violent with some pain relief. He noted she had described some slowing in her thinking and possible speech problems. Dr Mann thought the latter might be due to anxiety, but the former might be due to her medication. He suggested she adjust the dosage. Dr Mann said Mrs D was being referred to a pain management clinic and for physiotherapy.

Atos, 10 June 2013

26. The Atos medical adviser said he had seen Mrs D's application form, together with reports and a letter provided by her employer's occupational health physician. He said information had also been provided by Mrs D and her employer. The medical adviser said,

> "The applicant has been diagnosed with cervical/segmental dystonia and is under the care of a Neurologist. In his most recent report of 15.4.13, Dr Mann describes his initial consultation with her in January 2013, and the actions taken. He also addresses the long term prognosis. There appears to be good scope for considerable improvement with treatment, although he cannot be certain about complete resolution of her symptoms. When she was reviewed on 9 April, she appeared to have had some benefit from the treatment and further measures were planned.
>
> It is accepted that at present she is incapable of her NHS duties; however, the issue is permanence. She has 16 years to go to normal benefit age, and her specialist describes a likely improvement over 5-10 years. At this early stage in treatment, and with such uncertainty about the prognosis in this condition, it is not possible to accept permanent incapacity at this stage."

Dr Fletcher (consultant neurologist), 6 May 2013

27. Dr Fletcher's report was prepared at the request of Mrs D's solicitors. He expressed the view that Mrs D was suffering from a psychogenic movement disorder. He suggested that a road traffic accident in 2010 and subsequent musculoskeletal neck pain had exacerbated a longstanding tendency to anxiety and depression. Dr Fletcher said psychogenic movement disorders were distressing and disabling, and notoriously difficult to treat. He explained that response to standard treatment for dystonia was usually disappointing and medication often had side effects. He suggested the best strategy was a combined approach involving pain management, neuropsychological treatment (usually CBT), rehabilitation and treatment of any co-existent mental health disorder.

Dr Harrison (consultant in pain management), 19 May 2013

28. Dr Harrison's report was also prepared at the request of Mrs D's solicitors. Having reviewed her medical records, Dr Harrison said Mrs D continued to suffer with multiple pains; pain in the neck radiating to the base of the skull, into her ears, arms, fingers and shoulder blades. He noted she had recently developed bilateral pain in her jaw and forehead. He suggested the presence of pain in Mrs D's left elbow and fingers might be a possible carpal tunnel disorder. Dr Harrison said, on top of the pain, Mrs D suffered twitching and dystonia.

29. Dr Harrison expressed the view that the pain Mrs D suffered at the back of her spine was related to an injury to the cervical nerves supplying the joints between the vertebrae. He said Mrs D was suffering from nerve-type pain rather than pure musculoskeletal pain and noted she was taking appropriate medication for this. Dr Harrison said Mrs D required a pain management approach to her pain and described what he had in mind. He said these inputs had been demonstrated to be more effective and long lasting. Dr Harrison suggested Mrs D might need a bespoke programme lasting approximately two and a half years. He concluded by saying he could not give a prognosis until he had been able to reassess Mrs D six months after her treatment had been completed. He said he was unable to comment on Mrs D's position in the labour market.

Dr Foy (consultant neuropsychiatrist), 12 November 2013

30. Dr Foy agreed with Dr Fletcher's diagnosis of psychogenic movement disorder. He noted Mrs D had been complaining of chronic pain and restricted movement in her neck since the road traffic accident in 2010. He noted the pain had continued despite treatment and, as a result of the pain, her mood had dropped. Dr Foy noted Mrs D had been on antidepressant medication since 2011. He said she had clear evidence of a moderate to severe depressive episode and had typical biological symptoms of depression.

31. Dr Foy said the prognosis was guarded. He referred to Dr Fletcher's comment that psychogenic movement disorders were difficult to treat. Dr Foy noted Mrs D had only had one type of antidepressant so far. He thought she might benefit from a more aggressive treatment of her depressive symptoms. He suggested 10 to 15 sessions of CBT over six months. Dr Foy said it might be possible to give a more accurate opinion on Mrs D's longer term prognosis after a period of optimisation of her antidepressant medication and psychotherapy. He did not think she was currently fit for work.

Dr Ashworth (consultant in pain management), 16 December 2013

32. Dr Ashworth thought Mrs D had suffered soft tissue injuries at the time of the road traffic accident, which had healed but left her with a chronic pain syndrome. She said there was also some irritability in Mrs D's muscles and a resulting dystonia which Dr Mann was dealing with. Dr Ashworth expressed concern that individual areas of Mrs

D's condition were being considered for treatment when a holistic approach would be better. She was also concerned that Mrs D's medication was impairing her function. Dr Ashworth said, in an ideal world, she would like to engage Mrs D in a multidisciplinary pain management but this was not provided for locally. She referred to discussions with an insurance company involved in the road traffic accident about the possibility of offering this. Dr Ashworth said, in the meantime, she suggested reviewing Mrs D's medication. She said she would liaise with Dr Mann.

OH Assist, 5 August 2014

33. The OH Assist medical adviser confirmed she had seen the reports from Drs Fletcher, Harrison and Foy, together with information from Mrs D's GP and Dr Ashworth. She noted the bespoke programme of pain management, psychological therapy and physiotherapy recommended by the specialists had not been completed. She noted this was not, at that time, available locally but was supported by the insurers involved in the road traffic accident. The medical adviser thought this treatment likely to be available within the coming 16 years (to Mrs D's normal benefit age) with the insurers' help. She said,

> "However, on balance, it is considered that this member is not likely to improve sufficiently (physically and mentally) sufficient to successfully return to her significantly demanding NHS role, before normal benefit age, even with such treatment. It is considered that the evidence indicates that this member is, on balance of probabilities, permanently incapable of the duties of the NHS employment. The Tier 1 condition is met.
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> With respect to less demanding, part time, regular employment, which does not involve driving for work, the evidence does not confirm that 'appropriate medical treatment' has been completed. It is considered to be more likely than not that this member will recover sufficient to retrain for and to undertake such work, before normal benefit age, especially given compliance with appropriate medical treatment.
>
> 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 balance of probabilities, permanently incapable of regular employment of like duration. The Tier 2 condition is not met."

34. The medical adviser did not suggest Mrs D be given the option to request a review within the following three years on the grounds that there was insufficient uncertainty regarding functional prognosis.

Dr Mann, 16 June 2015

35. Following receipt of Mrs D's stage two appeal, OH Assist requested a report from Dr Mann. In the letter requesting a report, OH Assist provided details of the Tier 1 and Tier 2 criteria. In his response, Dr Mann said Mrs D appeared to have segmental dystonia mainly affecting her neck for which she received injections and medication. He explained,

> "[Mrs D's] segmental dystonia is predominantly cervical and involves twisting and violent movements of the neck upwards, backwards and to the side and the injections … I believe are helpful but these do wear off towards the end of the injection cycle which is every 3 months.
>
> These symptoms would affect her balance, concentration and also produce discomfort. I believe that her response has been reasonable and on going treatment … is planned.
>
> Usually this is indefinite as it is extremely rare for patients to go into spontaneous remission though it can occur in the first 5 years of treatment. Normally the injections improve the condition and an improvement can even occur between 5-10 years of treatment even though the injection regime remains the same.
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> I can't be certain as to whether absolute control of symptoms will occur though I have noticed an improvement in her symptomatology since starting treatment in 2013."

OH Assist, 29 July 2015

36. In their advice to the NHS BSA, the OH Assist physician said,

> "[Mrs D] is currently receiving a variety of specialist treatment interventions, and the medical evidence suggests that she will benefit from a multi disciplinary treatment plan involving pain relief medication therapy, a 6 month course of psychotherapy (Cognitive Behavioural Therapy) and further physiotherapy intervention.
>
> Although the lady is unlikely to return to the physical and mental demands of her NHS role, it is my opinion, based on the medical evidence presented, that the lady should improve with ongoing treatment, and be capable of a return to alternative employment of like duration prior to the Normal Benefit Age."

Appendix 2

The NHS Pension Scheme Regulations 1995 (SI1995/300) (as amended)

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

> "(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 -
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> (a) the member has at least 2 years' qualifying service or qualifies for a pension under regulation E1; and
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> (b) the member's employment is terminated because of physical or mental infirmity as a result of which the member is -
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> (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."

39. Regulation E2A further provided,

> "(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 -
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> (a) whether the member has received appropriate medical treatment in respect of the incapacity; and
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> (b) such reasonable employment as the member would be capable of engaging in if due regard is given to the member's -
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> (i) mental capacity;
>
> (ii) physical capacity;
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> (iii) previous training; and
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> (iv) previous practical, professional and vocational experience,
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> 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 -

(a) …; and

(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."