PO-15575

Ombudsman's Determination

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

Outcome

1. I do not uphold Mrs 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 S has complained that her eligibility for ill health retirement benefits has not been properly considered.

Background information, including submissions from the parties

Background

4. Mrs S was employed part-time (35.47 hours) as a clinical coding officer until December 2015. She had been on long term sickness absence since April 2014. Mrs S applied for ill health early retirement and her case was reviewed by the Scheme's occupational health advisers, **OH Assist**. Initial decisions as to a member's eligibility for ill health retirement benefits are taken by OH Assist under a delegated authority.

5. At the time Mrs S' employment ceased, the NHS Pension Scheme Regulations 1995 (SI1995/300) (as amended) applied. Regulation E2A provided for an ill health pension on early retirement. Extracts from the relevant regulations are provided in an appendix to this document. The Scheme provides for two tiers of benefit depending upon the level of incapacity. As a minimum, the member must meet "the tier 1 condition"; that is, he/she is permanently incapable of efficiently discharging the duties of their NHS employment.

6. OH Assist wrote to Mrs S, on 15 July 2015, saying it was unable to accept her application for ill health retirement benefits. It quoted from the report prepared by the doctor who had reviewed her case. Summaries of the medical evidence relating to Mrs S' case are also provided in the appendix.

7. Mrs S appealed the decision not to award ill health retirement benefits. In support of her appeal, Mrs S provided a report from a consultant rheumatologist, Dr Bevan. NHS BSA referred her case back to OH Assist to review. On 12 April 2016, NHS BSA wrote to Mrs S declining her appeal. It quoted from the advice it had received from the OH Assist medical adviser and said it saw no reason to disagree with his conclusions.

8. Mrs S appealed further. NHS BSA referred her case back to OH Assist. On 9 December 2016, NHS BSA wrote to Mrs S declining her appeal for the second time. The stage two decision maker quoted the advice received from the OH Assist doctor and said she could see no reason to disagree with his conclusion that Mrs S did not meet the tier 1 condition.

Mrs S' position

9. Mrs S' submission is summarised below:-

    - She has been told by her employer's occupational health doctor that she is unfit for work. She also paid to see a consultant rheumatologist privately and he confirmed that she is permanently unfit for work.
    - NHS BSA declined her application before seeing the results of the MRI scan recommended by Dr Bevan.
    - She worked for the NHS for 28 years and has found it difficult to accept the way she has been treated. She had asked about a part time job but was told that she was not fit for this.
    - Since losing her job, she has been living on state benefits, which has caused her a lot of financial stress. Her husband is self-employed and has had to miss work to look after her and take her to appointments.
    - Since she went on long term sick leave in 2014, she has attended all treatment options; for example, physiotherapy, acupuncture, hydrotherapy, NERS (National Exercise Referral Scheme) programme, pain control and counselling for depression.

10. In support of her application, Mrs S provided details of a news item from February 2017 relating to the recognition of fibromyalgia as a permanent disability. The news item concerns a decision by the Supreme Court of Catalonia that fibromyalgia and chronic fatigue syndrome are grounds for declaring permanent disability.

11. Having seen an opinion from one of our Adjudicators, Mrs S made the following further comments:-

    - She was advised by Dr Din to seek a professional opinion. Dr Din said he was only a GP and not a specialist.
    - She was only diagnosed with fibromyalgia in 2014, which is why it did not show up in her sickness record before this time.
    - She questions whether it is appropriate for a GP's opinion to be accepted over that of a specialist, such as Dr Bevan.

12. In support of her case, Mrs S provided a copy of a newspaper article, dated 17 July 2017, relating to a campaign to have fibromyalgia recognised as a full disability in the Equality Act 2010; it is currently referred to in the Act as an impairment.

Adjudicator's Opinion

13. Mrs 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:-

    - It is not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mrs S' eligibility for payment of benefits under regulation E2A. The Ombudsman is primarily concerned with the decision making process. Medical (and other) evidence is reviewed in order to determine whether it supported the decision made. The issues considered by the Adjudicator included: whether the relevant rules had been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision was supported by the available relevant evidence.
    - However, the weight which is attached to any of the evidence is for NHS BSA to decide (including giving some of it little or no weight). It is open to NHS BSA to prefer evidence from its own advisers; unless there is a cogent reason why it should not, or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser. If the decision making process was found to be flawed, the appropriate course of action was for the decision to be remitted for NHS BSA to reconsider.
    - To qualify for any benefits under regulation E2A, Mrs S had to meet the tier 1 condition as a minimum. In other words, she had to be permanently incapable of efficiently discharging the duties of her NHS employment when her employment ceased. Permanently meant at least until her 60th birthday. Mrs S was deemed unfit for work at the time her employment ceased, so the question was whether, on the balance of probabilities, she was likely to recover sufficiently before her 60th birthday to be able to undertake her former duties.

- The first instance decision had been delegated to OH Assist. Its doctor was of the view that Mrs S did not meet the tier 1 condition. He noted that Mrs S had been suffering with neck problems for a number of years but that this had not impacted on her work capability. He noted she had been referred for pain management and for exercise and fibromyalgia specialist advice, and that these were expected to improve her coping strategies. The doctor discussed the recommended treatment for Mrs S' condition and said the natural progression for this condition was gradual improvement with most patients becoming fit for work within three years of specialist referral. He noted Mrs S' sickness absence record showed only one absence since 2010 for back pain. From this, he concluded there was no evidence of a longstanding pattern of disabling fibromyalgia symptoms. The OH Assist doctor expressed the view that, with appropriate treatment, Mrs S was likely to recover sufficiently to be able to undertake her former NHS duties before her 60th birthday.

- The Adjudicator did not identify any error or omission of fact in the OH Assist doctor's report. He referred to the correct eligibility test under regulation E2A, he was aware of Mrs S' NHS duties and her normal pension age. The Adjudicator appreciated that Mrs S (and later Dr Bevan) took a different view as to the likely outcome of treatment for her condition. However, the Adjudicator had not identified any reason to suggest that it was maladministration for the OH Assist doctor's opinion to be accepted.

- Mrs S appealed the decision not to award ill health retirement benefits under regulation E2A. In support of her appeal, she submitted a report from Dr Bevan. He was of the opinion Mrs S would continue to have severe symptomology and was permanently incapable of work. NHS BSA asked OH Assist to review Mrs S' case. The OH Assist doctor noted Dr Bevan's view. He went on to say that ill health retirement could only be considered "when appropriate medical treatment has been tried and failed and there is no prospect of sufficient recovery". This is not an accurate reflection of the requirements of regulation E2A. There is no requirement that treatment should have been tried and failed before a member can qualify for benefits. What is required is an assessment of the likelihood that the relevant treatment will or will not result in sufficient recovery before normal benefit age.

- Having said this, the Adjudicator noted the OH Assist doctor did go on to consider whether or not the appropriate medical treatment was likely to bring about sufficient improvement in Mrs S' condition for her to be able to resume her former duties before her 60th birthday. He was of the opinion that it was likely to bring about such a recovery. This is contrary to the view expressed by Dr Bevan.

- As had been explained, the weight which is attached to any of the evidence is for NHS BSA to decide[1]. That being said, NHS BSA could be expected to proceed cautiously when its doctor, who is not a specialist in the condition under consideration, disagrees with a specialist's view. This is not to say that a specialist's opinion should always prevail but NHS BSA should be looking for an explanation from its doctor as to why his view differs from that of the specialist. There was no such explanation in the stage one appeal opinion. However, Mrs S' case went on to be considered at stage two. The stage two OH Assist doctor said Dr Bevan's opinion was not in keeping with the consensus of medical opinion and he did not appear to have considered reasonable treatment.

- Mrs S' case, therefore, came down to a difference of medical opinion. NHS BSA has decided to accept its own doctors' opinion in preference to that expressed by Dr Bevan. It is free to do so in the absence of a reason why it should not. The Adjudicator had not identified any such reason.

- The Adjudicator noted the information concerning the Catalonia court's decision. However, this information was not available at the time OH Assist and/or NHS BSA were making their decisions concerning Mrs S' eligibility for benefit. The validity of a decision can only be assessed by reference to information/evidence which was or could reasonably have been available to the decision maker at the time.

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

Ombudsman's decision

15. If Mrs S is to receive benefits under regulation E2A, she had to have met the eligibility test when her employment ceased in December 2015. In other words, she had to be considered permanently incapable of efficiently discharging the duties of her NHS employment; that is, more likely than not to remain incapable of discharging those duties at least until her 60th birthday. Since Mrs S was considered unfit for work at the time her employment ceased, it was actually a question of whether she would be capable of discharging those duties at some later date but before her 60th birthday. There is a clear difference of opinion on this point; between Mrs S and Dr Bevan, and the OH Assist doctors advising NHS BSA.

16. Mrs S has questioned why Dr Bevan's view was not accepted by NHS BSA when he is a specialist in her condition. There is no requirement under the NHS Pension Scheme Regulations 1995 for NHS BSA to obtain an opinion from a specialist in the

[1] *Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

member's condition. This is not to say that NHS BSA is precluded from seeking and/or considering such an opinion. NHS BSA has appointed OH Assist to provide it with medical advice. The doctors employed by OH Assist are specialists in occupational health. I do not find that this is inappropriate in view of the fact that what is required, under regulation E2A, is an assessment of the member's capacity for work. OH Assist provided NHS BSA with an explanation for why its doctors took a different view. I do not find that it was maladministration for NHS BSA to accept the opinion provided by the OH Assist doctors.

17. I have noted the additional evidence provided by Mrs S. This illustrates the fact that fibromyalgia, as a condition, is perhaps, as yet, not as well understood as other conditions. However, this information cannot be taken into account in assessing NHS BSA's approach to deciding Mrs S' condition because it was not available at the time of the decision.

18. I realise it will be disappointing for Mrs S but I do not uphold her complaint.

Anthony Arter

Pensions Ombudsman
8 August 2017

Appendix

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

19. At the date Mrs 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 (the "tier 2 condition") in addition to meeting the tier 1 condition.

…

(13) For the purposes of determining whether a member is permanently incapable of efficiently discharging the duties of the member's employment under paragraph (2)(b)(i), the Secretary of State shall have regard to the factors in paragraph (15) (no one of which shall be decisive) and disregard the member's personal preferences for or against engaging in that employment.

(14) …

(15) The factors to be taken into account for paragraph (13) are -

(a) whether the member has received appropriate medical treatment in respect of the incapacity;

(b) the member's -

(i) mental capacity; and

(ii) physical capacity;

(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; and

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

(16) …

(17) ...

(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 [age 60]; ..."

Medical evidence

Dr Jones (occupational health physician), 29 July 2014

20. In a letter to Mrs S' former employer, Dr Jones noted Mrs S had a long history of musculoskeletal symptoms and had been diagnosed with fibromyalgia, for which she was taking medication. He said Mrs S remained highly symptomatic. He said he had provided advice on coping strategies and suggested she discuss further treatment options with her GP. Dr Jones said Mrs S was not going to be able to return to work in the next few weeks. He said it was difficult to predict an outcome but thought there remained the potential for a good recovery. He said he could see no reason why Mrs S should not be able to return to her substantive duties if and when that occurred.

Dr Din (consultant in occupational medicine), 7 November 2014

21. In a letter to Mrs S' former employer, Dr Din said Mrs S was making slow progress, but he could confirm that she was accessing all appropriate support. He expressed the view that Mrs S was temporarily unfit to return to work.

Dr Din, 6 February 2015

22. Dr Din reported Mrs S had had recent medication changes which were likely to take a number of weeks to become effective. He said he understood she was being referred to specialist services. Dr Din advised Mrs S remained temporarily unfit to return to work.

Dr Din, 13 April 2015

23. Dr Din said Mrs S continued to be unable to carry out her normal day to day activities due to ongoing symptoms. He said she continued to be active in her treatment and he was unable to advise any additional medical measures to improve her prognosis. Dr Din said, on the balance of probabilities, Mrs S was unfit to return to work for the foreseeable future. He said he had advised Mrs S to obtain a pension forecast and asked her employer to initiate the application process.

Dr Din, 19 June 2015

24. Dr Din completed Part C of the ill health retirement form AW33E. He said Mrs S had been suffering from cervical spondylosis for 25 years, had had a cervical disc prolapse in 2010, and fibromyalgia since 2014. Dr Din listed the medication Mrs S had been prescribed and said she had been referred to a pain clinic and to a fibromyalgia clinic. He expressed the view that Mrs S' function might improve with normal therapeutic intervention to her NHS pensionable age. He said her symptoms would wax and wane and there were likely to be periods where her health and function improved before her NHS pension age. Dr Din went on to say Mrs S was not fit to carry out her NHS duties and was not fit for work in the foreseeable future. He said the long term prognosis was uncertain and her function was likely to improve

with better symptom control. He expressed the view that Mrs S was not fit for any regular employment for the foreseeable future.

OH Assist, 15 July 2015

25. The OH Assist doctor said he had seen the AW33E completed by Dr Din, information about sickness absence provided by Mrs S' employer and a personal statement from Mrs S (Part B of AW33E). He expressed the view that the evidence did not indicate that, on the balance of probabilities, Mrs S was permanently incapable of efficiently discharging the duties of her NHS employment. He gave the following reasoning:-

    - Mrs S had applied for ill health retirement due to a fibromyalgia condition. Dr Din had described a complex of symptoms, including headaches, migraine, fatigue, low mood, anxiety, tiredness, anhedonia, poor memory/concentration, muscle aches and flu like symptoms. Mrs S was described as having a history of neck problems but these were not said to be an obstacle to work at the time. Mrs S' musculoskeletal symptoms were said to have worsened since 2010 as a result of changes to her role. She had been prescribed medication which had been changed and adjusted due to side effects.

    - Mrs S had been referred for pain management and for exercise and fibromyalgia specialist advice. Dr Din expected these to improve her coping strategies. Dr Din was of the view that Mrs S' function might improve before her NHS pension age.

    - Recommended treatment would include a graded exercise programme, aiming to increase activity levels in a planned way, and cognitive behavioural therapy to enable the individual to overcome negative thoughts and feelings. Mrs S had not yet been prescribed these therapies. Further adjustment to her medication might also be expected to improve her mood, which was noted to be a significant barrier to a return to work.

    - Mrs S' function was likely to improve with better symptom control. This was consistent with Dr Din's opinion. The natural progress of this condition was for gradual improvement, with most individuals being fit for work over a period of time spanning months or years. Most individuals became fit for work over a period of three years from specialist referral. He cited an article in the British Medical Journal 1994.

    - Mrs S' sickness absence record showed only one absence since 2010 related to back pain symptoms. Therefore, there was no evidence of a longstanding pattern of disabling fibromyalgia symptoms.

    - Application of the above treatments was likely to result in improvement in Mrs S' condition sufficient, on the balance of probabilities, to enable her to become fit for her current role before the age of 60.

Dr Din, 21 September 2015

26. Dr Din said Mrs S had attended a consultation, with her husband, and he had assessed her current health and fitness for work. He said Mrs S had reported a deterioration in her symptoms and function. He advised that Mrs S was not fit to return to work in the foreseeable future and he could not advise any adjustments to her role or a suitable alternative role.

Dr Bevan (consultant rheumatologist), 10 November 2015

27. In a letter to Mrs S' GP, Dr Bevan outlined the symptoms she was experiencing and the results of his examination. He said Mrs S had multiple tender areas which would be consistent with a diagnosis of fibromyalgia. He asked for a number of tests to be undertaken to exclude other possibilities. Dr Bevan said the prognosis for fibromyalgia was continued ongoing symptoms which were poorly responsive to medication. He suggested Mrs S would continue to have severe symptomology and was permanently incapable of work.

OH Assist, stage one appeal April 2016

28. The OH Assist medical adviser said he had considered Dr Bevan's report and a letter from Mrs S. He expressed the view that, on the balance of probability, Mrs S was not permanently incapable of the duties of her NHS employment. He gave the following rationale:-

    - Mrs S had been unable to work due to ill health since April 2014. She had suffered from cervical spondylosis for many years but this had not impacted on her work capability. Approximately 18 months to two years previously, she started to develop generalised joint pain, which had worsened and was associated with headaches, fatigue, sleep disturbance, low mood, poor memory and concentration, and muscle aches.

    - Mrs S had been prescribed medication and had been intolerant of certain drugs.

    - Mrs S had been seen by Dr Bevan and he had recommended certain tests to rule out other possible causes of her symptoms. Mrs S had stated that she wished to proceed with her appeal despite the fact that the results of an MRI scan were outstanding.

    - Dr Bevan was of the opinion that Mrs S was going to have ongoing severe symptomatology and that she was permanently incapable of work.

    - Ill health retirement can only be considered when appropriate reasonable medical treatment has been tried and failed, and there is no prospect of sufficient recovery to allow a return to work before normal benefit age.

    - Given the working diagnosis of fibromyalgia, he agreed with the previous OH Assist doctor. Mrs S had not yet had the benefit of NICE recommended

treatment, including graded exercise therapy and cognitive behavioural therapy. There was scope for an improvement in Mrs S' mood with changes to medication.

- He agreed with Dr Din that the prognosis in the long term was uncertain and Mrs S' function was likely to improve with symptom control.

- It was likely that, with full compliance with appropriate medical treatment and the passage of time, there would be sufficient improvement in Mrs S' symptoms and function to enable her to resume her NHS duties before her 60th birthday.

Mr Redfern (consultant neurosurgeon), 25 August 2016

29. In a letter to Mrs S' GP, Mr Redfern said Mrs S complained of diffuse pain affecting her knees, elbows, neck and feet. He said the worst pain was in Mrs S' arms and both her hands were affected. He said there were no overt neurological abnormalities and went on to describe the outcome of certain tests and the results of an MRI scan. Mr Redfern concluded,

> "There are several things here. Firstly, the main symptoms are more likely to be due to the fibromyalgia than due to the degenerative changes in her neck. Secondly, there is little clinical evidence in support of a diagnosis of spondylotic cervical myelopathy. And thirdly, the sagittal and axial MR images do not correlate. I have … stated that I think it is unlikely that surgery will have any part to play in her management. At present, however, I am just a little concerned about the radiological appearances and have therefore requested a further MRI scan … If this does confirm significant cord compression (as is suggested possibly erroneously) … then it may be that surgery might just be indicated but I have told her that even if that was the case it is unlikely that there will be any improvement in the diffuse pain symptoms of which she complains. These are much more likely due to the fibromyalgia (or other condition) …"

Mr Redfern, 17 November 2016

30. Mr Redfern said he had reviewed Mrs S and her symptoms remained as previously described. He described the results of a recent MRI scan. Mr Redfern said there was no indication for surgical treatment.

OH Assist, stage two appeal December 2016

31. The OH Assist doctor expressed the view that Mrs S did not satisfy the tier 1 condition. He gave the following rationale:

    - Mrs S' sickness record showed continuous absence from April 2014, with reasonable prior attendance since 2010 and no absence for cervical spondylosis/neck problems.

- Information from Mrs S' GP had indicated the results of additional tests recommended by Dr Bevan had been normal. Mrs S had a working diagnosis of fibromyalgia and was taking medication.

- Dr Bevan had said the prognosis for fibromyalgia was for continued symptoms which were poorly responsive to medication. He suggested Mrs S would have ongoing severe symptomatology and that she was permanently incapable of work. This opinion was not in keeping with the consensus of medical opinion. Dr Bevan appeared not to have taken account of reasonable treatment, following NICE guidelines and a multidisciplinary biopsychosocial approach including sleep hygiene, medication, cognitive behavioural therapy and graded exercise therapy.

- On balance, it was considered that fibromyalgia was the likely cause of her current symptoms. Reasonable treatment would include: multidisciplinary team management using a biopsychosocial approach to pain management, fatigue and functional restoration; sleep hygiene; specialist involvement for Mrs S' headaches; medication from different classes and in combination; psychological therapy; behavioural therapy; and specialist services involvement for any low mood which constituted mental ill health.