PO-8122

Ombudsman's Determination

Applicant	Mr N
Scheme	NHS Pension Scheme (**the Scheme**)
Respondents	NHS Pensions

Outcome

1. I do not uphold Mr N's complaint and no further action is required by NHS Pensions.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N's complaint is that he has been refused ill health retirement from active status (in 2008).

Background information, including submissions from the parties

4. Mr N was a Senior Payroll Services Officer. In 2008 he applied for ill health retirement.

5. In part C of Mr N's application, Dr Tidley (Consultant in Occupational Medicine) listed Mr N's medical conditions as: Ischaemic heart disease /cardiac dysrhythmia, diabetes mellitus, hypertension, bronchial asthma, low back problems/sciatica and glaucoma/vitreous retinal detachment. Dr Tidley said Mr N had reduced his hours of work to try to overcome the impact of his multiple health problems, but despite this and treatment he had significant ongoing problems with fatigue, chest pain, probable diabetic kidney disease and hypertension. Dr Tidley gave his opinion that Mr N's problems were likely to continue to affect his fitness for work in the long-term and he was unable to identify any further realistic adjustments that would overcome his difficulties. Dr Tidley said Mr N was permanently incapable of efficiently discharging the duties of his current NHS employment.

6. At that time regulation E2 'Early retirement pension (ill-health)' (of 'The NHS Pension Scheme Regulations 1995') applied. As relevant this said:

> "(1) A member who retires from pensionable employment because of physical or mental infirmity that makes him permanently [to the normal benefit age of 60 years]

incapable of efficiently discharging the duties of that employment shall be entitled to a pension under this regulation if he has at least 2 years' qualifying service or qualifies for a pension under regulation E1 (normal retirement pension)."

7. Acting on behalf of NHS Pensions, Atos Healthcare (the Scheme's Medical Adviser) turned down Mr N's application. The Atos doctor said that Mr N had not demonstrated current incapacity for his NHS role:

   - Sickness records showed that Mr N had been absent for 21 days in 2007 and none in 2008.
   - No specialist involvement had been reported.
   - The employer had indicated that Mr N's weekly hours of work had been reduced to 26.25 in 2004 and that he worked in a less busy and less noisy office for 3 days per fortnight.
   - Notwithstanding his diagnosed conditions, current treatment and workplace measures appeared to be enabling Mr N to maintain reasonable attendance.

8. In February 2010 Mr N invoked the Scheme's two-stage internal dispute resolution (**IDR**) procedures.

9. Mr N submitted with his 2010 IDR stage 1 appeal two letters from Dr Tidley, both dated 25 January 2010. The first to Mr N enclosed an open letter of support for Mr N's request for a review of the 2008 decision. In the open letter Dr Tidley said:

   - Mr N had several chronic underlying health problems (the same conditions that were listed in 2008).
   - Functionally the combination of these difficulties was associated with significant fatigue, intermittent chest pain and significant right-sided abdominal pain secondary to the underlying medical problems.
   - Mr N's visual impairment (particularly affecting his right eye) functionally impaired his use of a computer and paper management, that were core aspects of his office based duties.
   - While Mr N had tried to minimise the impact these problems had on his work attendance and sickness record by taking annual leave or working flexibly he had now reached the point where he was clearly unfit for work.
   - Mr N had had specialist involvement in relation to some of his medical conditions. He remained under the regular review of an Ophthalmologist for his glaucoma and vitreous retinal detachment; and had several years ago been assessed by a Consultant Neurosurgeon (who had declined to proceed with spinal surgery) in relation to his long standing problems with low back pain/sciatica.
   - Mr N's problems with ischemic heart disease and diabetes were under appropriate clinical management by his GP and the treatment for these and his asthma had been optimised with appropriate medication such that further improvement in their control was unlikely in the short or long term.

- The further deterioration in Mr N's health problems reinforced his original opinion that it was likely that he was permanently incapable of efficiently discharging his NHS duties.

10. In April 2010 Mr N took early retirement.

11. Atos commissioned a report from Mr N's GP (Dr Gronow) dated 18 May 2010. Dr Gronow confirmed Mr N's aforementioned health problems, provided details of the treatments he had had and was receiving and enclosed a copy of hospital records for the last five years. Dr Gronow said that Mr N had struggled to continue to work for a number of years and now felt he had reached the point where he could not continue "as he is finding it far too stressful with his current ongoing symptoms".

12. NHS Pensions' original stage 1 decision was issued in June 2010. Mr N was notified that his appeal had been unsuccessful as he had failed to meet the Tier 1 condition. Mr N appealed that decision in October 2010. The following month NHS Pensions informed Mr N that his case was to be reconsidered under IDR stage 1 as his dispute had been considered incorrectly under post 1 April 2008 rules.

13. Atos commissioned a further report from Dr Gronow dated 16 March 2011, which provided further details on Mr N's conditions:

    - Cardiac complaint – an ECG showed established left bundle branch pattern at rest since September 2010. BP was controlled, heart sounds normal and chest clear.
    - Eye complaint – Dr Gronow had asked Mr N to have an up to date Optician check. His last consultation with the Ophthalmology Consultant (in January 2011) showed his visual acuity in his right eye to be 6/18 (compared to 6/6 in November 2007). He had right eye amblyopia, right eye high myopia and primary open angle glaucoma. The current treatment for his glaucoma was G Lumigan nocte both eyes and G Trusopt ths both eyes.
    - Back pain – treatment proposed to remain mobile, exercise, analgesia when required.
    - Asthma – It was not interrupting his sleep. He occasionally used B2. In February 2011 he had complained of chest tightness and requested an inhaler. He had been referred to the Asthma Clinic for a current spirometry.
    - Diabetes – Mr N was able to self-manage hypoglycaemia attacks.
    - Other Conditions – Mr N was suffering from intermittent right upper quadrant pain and had been reviewed by a Consultant Gastroenterologist in July 2010.

14. Dr Gronow said that Mr N did not suffer from any mental health problems, although while working did complain of stress.

15. Another Atos doctor considered Dr Gronow's report (which included recent hospital correspondence), a November 2010 letter from Mr James (Specialist in Spinal Surgery), Mr N's October 2010 appeal and the previous existing evidence.

16. The Atos doctor gave their opinion that Mr N was not permanently incapable of the duties of his NHS employment:

    - The heart specialist had notified Mr N that an angiography had shown normal coronary vessels and that his chest symptoms were likely to be muscular in nature.
    - The eye specialist had advised that while his right eye had deteriorated since November 2007 overall his vision was compatible with work.
    - The MRI scan of his lower back showed minor degenerative disease and no evidence of a serious spinal condition (the general medical consensus was that mechanical back pain was best treated by maintenance of physical activity). The evidence indicated that a return to work would not cause further damage to Mr N's spine provided appropriate measures were put in place to meet the Manual Handling at Work Regulations).
    - Lung function tests showed good lung performance and control of his asthma. His diabetes was well controlled and the Consultant Gastroenterologist could not find any cause for his abdominal pain.

17. NHS Pensions accepted Atos' opinion and turned down Mr N's stage 1 appeal.

18. At IDR stage 2 Mr N, amongst other things, said:

    - The Atos doctor had overlooked his work related stress.
    - Dr Gronow and Dr Tidley both supported his application. But it appeared little weight had been attached to their opinions, despite both being best placed to assess his problems.
    - While he had not previously mentioned the fact he had been "victimised and even bullied" at work, which combined with his physical problems proved too much for him.
    - His physical problems remained as they were permanent conditions. His diabetes and back problems were both worsening. He still suffered from hypertension and the same levels of fatigue
    - Mr James' report had not mentioned the pain he was suffering. He was currently seeing a chiropractor to attempt to reduce the pain in his hip, lower back and shoulders.
    - He was experiencing greater problems with his stomach and his medication had been changed.
    - He had not previously mentioned that he also had gradually worsening tinnitus in his right ear, which was particularly bad at night.
    - He took little exercise because it instantly gave him chest pain.

19. Atos commissioned reports from Dr Tidley and Dr Gronow and obtained a complete copy of Mr N's occupational health records.

20. Dr Tidley said he had reassessed Mr N in May 2012. Mr N's control of his problems with diabetes mellitus had deteriorated since his last appointment in January 2010

and he was now under investigation for abnormal liver function test results with a possibility that this problem related to his long standing polypharmacy. Since leaving his NHS employment he understood that there had been some limited improvement in relation to Mr N's lower back problems but the control of his difficulties with hypertension had deteriorated (requiring further adjustment to his medication). Mr N's difficulties with chest pain continued to be aggravated by cold conditions, which prevented him from approximately walking more than 200 yards without resting to allow the symptoms to improve.

21. Dr Tidley provided a copy of papers that Mr N had passed to him during the appointment pertaining to very difficult workplace problems he had experienced over several years – relating to enduring hostility Mr N had reportedly experienced from several staff. To help manage the problem he had been relocated, but following reorganisation he was required to return to the office. Dr Tidley said he was sure that this situation precipitated and perpetuated Mr N experiencing a variety of symptoms of anxiety/depression and these problems had continued and "compound his likely inability to provide regular and effective service in combination with his other continuing health problems. Dr Tidley said he fully supported Mr N's original application for ill health retirement.

22. Another Atos doctor gave their opinion that Mr N was not permanently incapable of the duties of his NHS employment. Among other things the Atos doctor said:

- Dr Gronow had indicated that the main physical conditions causing incapacity for work were back, neck and shoulder pain. Spinal investigations had revealed only minor degenerative changes. Mr N's symptoms were controlled with moderate analgesia and his chiropractor had indicated further therapeutic avenues to reduce the level of his experienced pain. He could also benefit from Pain Management.
- Dr Gronow had indicated that Mr N's blood pressure was currently well controlled, visual acuity was normal and that he was fully compliant with his diabetic medications and follow-ups.
- Concerning work related stress there was no evidence of psychological problems in Mr N's original application, or in the medical records submitted by Dr Gronow and Occupational Health. There was no evidence of absences related to stress at work and Mr N had not had any medications or other therapies (including specialist input to help his condition). Dr Tidley had only mentioned Mr N's stress/anxiety/depression in his most recent report.
- It was noted that Mr N had reduced his weekly contracted hours on a few occasions to allow him additional rest time, but not to address any psychological problems. He was also allowed to work at an alternative office in a less pressurised, less busy and noisy environment, which had helped his hypertension.
- His multiple health problems were stable on medications or may become controlled with therapeutic interventions that had not been explored. It was also expected that workplace adjustments should help accommodate his physical

symptoms and there were suitable measures that still could be implemented to allow Mr N to continue his NHS employment despite perceived work related stress.

23. NHS Pensions accepted Atos' opinion and turned down Mr N's appeal.

Adjudicator's Opinion

24. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS Pensions. The Adjudicator's findings are summarised briefly below:

- NHS Pensions had complied with the Scheme's Regulations - while NHS Pensions had at first considered Mr N's IDR stage 1 appeal under the wrong regulation, this was subsequently corrected and therefore there was no resultant injustice to Mr N.
- NHS Pensions had considered all of the relevant evidence (including Dr Tidley's opinion, Mr N's glaucoma and the issue of bullying at work).
- While Mr N disagreed with Atos' assessment and Dr Tidley supported Mr N's application that was not sufficient for the Ombudsman to say that NHS Pensions' preference for their medical advisers' opinion was perverse.
- Mr N's comment on the current state of his health was applying the benefit of hindsight.

25. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which have been taken into account. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr N for completeness.

Ombudsman's decision

26. As the Adjudicator said my role is to decide whether NHS Pensions have correctly applied the Scheme's Regulations, considered all of the relevant evidence (it is for the NHS Pensions to decide what weight, if any, to attach to that evidence) and made a decision which is not perverse.

27. I am satisfied that NHS Pensions have abided by the Scheme Regulations and considered all of the relevant evidence.

28. Mr N says he did not mention bullying in his original application, or to Dr Tidley, as he found it humiliating and embarrassing. Yet even without this information Dr Tidley clearly supported his application. He says that Atos never asked him to expand on any of the details he provided.

29. It was for Atos to decide whether they required further information from Mr N - they did request reports from Dr Gronow and Dr Tidley and consideration was given to Mr

N's claim of bullying. While Dr Tidley supported Mr N's application that is not sufficient for me to find that NHS Pensions' decision was perverse in preferring the opinion of their medical advisers.

30. Mr N says he does not believe that Atos considered the likely deterioration in his permanent medical conditions to age 60. He says the NHS would never be able to implement changes to his working environment and that severe back pain cannot be controlled by giving someone a slightly different chair. He says due to this he reduced his working hours.

31. Atos were required to give their opinion based on the medical evidence available around the time of Mr N's application in 2008, or referring back to his health conditions at that time. I am satisfied that was done.

32. Mr N says he is left wondering whether his working as a pension adviser had some negative effect on his application. Correctly account was taken of Mr N's NHS duties, as his capability to efficiently discharge these was the test for ill health retirement. I have seen nothing to suggest that Mr N's application was penalised because of his occupation.

33. I agree with the Adjudicator that NHS Pensions decision was properly made.

34. Therefore, I do not uphold Mr N's complaint.

Anthony Arter
Pensions Ombudsman

4 July 2016