

Ombudsman's Determination

Applicant	Dr A
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Dr A's complaint and no further action is required by NHS BSA.

Complaint summary

2. Dr A is unhappy that NHS BSA has refused to pay him a lump sum after the termination of his second employment following being awarded Permanent Injury Benefit (**PIB**).

Background information, including submissions from the parties

3. Dr A sustained a psychiatric injury whilst working for an NHS employer as a GP registrar.
4. He subsequently took long term sickness absence following the injury as a result of depressive symptoms. He returned to work in 2014, working 60% of full-time hours (having worked full-time previously).
5. Dr A subsequently applied for PIB and, on 1 September 2015, he was informed that his application for PIB had been successful.
6. On 25 September 2015, Dr A's employment was terminated.
7. On 20 October 2015, Dr A's PIB allowance was put into payment and, on 25 October 2015, he was paid a lump sum, as part of his PIB award, of £27,046.49.
8. On 22 February 2016, Dr A returned to employment, this time on a 40% of full-time basis. This job was also terminated, on 31 May 2017, because of effects from the previous psychiatric injury.
9. Following the termination of this later employment, Dr A applied for the payment of a lump sum.

10. On 22 August 2017, NHS BSA declined the application, so Dr A appealed the matter under the Scheme's two stage Internal Dispute Resolution Procedure (**IDRP**).
11. In its second stage IDRP decision, NHS BSA said:-
 - Dr A considered that by virtue of the fact that his employment from 29 September 2015 to 31 May 2017, was terminated by reason of the accepted psychological injury, he should be paid a lump sum award provided by Regulation 4(9) of the NHS Injury Benefit Regulations 1995 (**the Regulations**).
 - However, as stated, Regulation 4(9) was relevant to a person mentioned in Regulation 4(2) or 4(3). Therefore, Regulation 4(9) was relevant to a person to whom no lump sum had been paid.
 - Further, Regulation 18 prevented Dr A from being paid a lump sum if he had already received one for the same injury. It was therefore unable to accept that Dr A was entitled to the payment of a lump sum in relation to the cessation of his NHS employment on 31 May 2017.
12. Dr A then referred his complaint to us for an independent review. In the letter which accompanied his application form, he made the following points:-
 - His injury was determined and formally accepted by NHS BSA as wholly or mainly attributable to his NHS employment.
 - Regulation 4(9) set out that: A person mentioned in paragraph (2) or (3), or a person mentioned in paragraph (4) who subsequently ceases to be employed as such a person by reason of the injury or disease, shall be entitled to receive a lump sum of the proportion of average remuneration shown in column (2) of the table hereunder in relation to the degree by which his earning ability is reduced.
 - Therefore, upon the termination of his NHS employment in May 2017, he should have automatically become eligible for a lump sum payment. He was eligible for a lump sum as he satisfied the wording under Regulation 4(9) because he was a person mentioned in 4(2) of the Regulations by being eligible for an annual allowance. He had ceased to be employed from his NHS job on 31 May 2017 directly due to the effects of his qualifying injury and he had not received any lump sum on or after 31 May 2017.
 - NHS BSA had argued that as it had already paid him a lump sum in 2015, it was not required to do so after he was terminated from his role in the later job. He disagreed; there was nothing to suggest this in the Regulations and the two terminations were from different jobs. NHS BSA was not allowed to offset any lump sum paid upon his previous job's termination against the lump sum which naturally fell due when his more recent job was terminated in May 2017.
 - NHS BSA had said that Regulation 18 prohibited it from paying the lump sum, which concerned the avoidance of duplicate benefits and stated that benefits

would not be payable in respect of the same injury under a corresponding scheme. The Regulations had not defined the meaning of “corresponding scheme” but this could not mean the Scheme itself as this would mean NHS BSA was “comparing itself with itself.”

13. NHS BSA sent The Pensions Ombudsman its response to the complaint with its reasoning as to why a second lump sum was not payable. This was the same as its IDRP response. It said Dr A’s reading of Regulation 4(2) demonstrated a fundamental misunderstanding of the Regulations. It added that this Regulation referred to a PIB allowance, but this was a moot point because a claimant could only be paid a lump sum if they were a person mentioned in Regulation 4(2).
14. Dr A provided his comments:-
 - Contrary to what NHS BSA had said, his second job was actually put into place on 22 February 2016, albeit retrospectively from 29 September 2015.
 - There was nothing in the Regulations to stop anyone who was terminated from their previous NHS job and that received a lump sum, from trying for another job within the NHS. In fact, the abatement of earnings mentioned in Regulation 13(4) suggested that the Regulations supported this.
 - Similarly, there was nothing in the Regulations which said that a lump sum should be withheld if the person’s employment was terminated a second time.
 - The Regulations had mentioned the possibility of re-employment in Regulation 13(4) therefore they must have considered the possibility of termination of this re-employment because the injury is permanent and ongoing. If the draftsman’s intention was to withhold the lump sum after a second termination from a job, they would have clearly stated this.
 - NHS BSA had tried to confuse the matter by referring to it as a second lump sum. This was not a second lump sum but a “lump sum due to termination of second job.”

Adjudicator’s Opinion

15. Dr A’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 below:-
 - Regulation 4(9) provided that: “A person mentioned in paragraph (2) or (3), or a person mentioned in paragraph (4) who subsequently ceases to be employed as such a person by reason of the injury or disease, shall be entitled to receive a lump sum of the proportion of average remuneration shown in column (2) of the table hereunder in relation to the degree by which his earning ability is reduced.”

- This set out that a lump sum shall be paid to a person whose circumstances fell into those outlined in the paragraphs mentioned, these being paragraphs 4(2), 4(3) and 4(4).
- Dr A previously received his PIB award in accordance with Regulation 4(4). PIB was awarded to Dr A as he had suffered a reduction in the emoluments of an employment on the basis that prior to the injury, he was working full-time and afterwards, he was employed on a part-time basis. Dr A was paid a lump sum, having satisfied paragraph 4, as he subsequently ceased to be employed by reason of the injury.
- After Dr A left what he referred to as his second job, he did not return to work, so paragraph 4 could no longer apply to him as he had not suffered a reduction in the emoluments of his employment, rather, he ceased to be employed. This meant paragraph 2 or 3 of Regulation 4 would need to apply to him in order for him to be entitled to a lump sum.
- Both paragraph 2 or 3 of Regulation 4 stipulated that the stated terms within applied where no allowance or lump sum, other than under paragraph (5) or (5A), has been paid (and in terms of paragraph 3 specifically, Dr A has not reached normal benefit age). As Dr A was paid a lump sum (other than that mentioned in paragraph 5 or 5A) in October 2015, the Regulations did not allow for a lump sum to be paid to him now.
- NHS BSA's actions in not paying the lump sum in question did not amount to an administrative error.

16. NHS BSA accepted the Adjudicator's Opinion. Dr A did not accept the Adjudicator's Opinion and made the following points:-

- His opinion was that he was paid a lump sum because he satisfied Regulation 4(9) and was a person mentioned in paragraph 4, and ceased to be employed by reason of the injury. By the same logic, he was still a person mentioned in paragraph 4 and had ceased to be employed in May 2017 by reason of his injury, and therefore he satisfied Regulation 4(9) in his claim for a lump sum.
- He did not agree with the statement that after he left his second job, he did not return to work, so paragraph 4 could no longer apply to him and therefore paragraph 2 or 3 would need to apply instead. He did not agree with this interpretation. If this was correct, NHS BSA would have stopped paying him PIB after he was terminated on 31 May 2017, as he had ceased to qualify under Regulation 4(4).
- Further, he would also have failed to satisfy Regulations 4(2) and 4(3) due to having received a lump sum in 2015. Going by this assessment, his termination would have disqualified him from receiving any further PIB after 31 May 2017. This was because Regulations 4(2), 4(3) and 4(4) were the ones which determined one's eligibility to receive "an annual allowance."

- This would mean that the Regulations were self-contradictory and unfit for purpose. He would therefore ask two questions: 1) Which regulation (or paragraph) did he currently satisfy to continue getting his PIB? 2) Could he be dis-qualified from a regulation he had previously satisfied? If yes, under which provision?
- NHS BSA had acknowledged that his PIB continued to be paid under Regulation 4(4) and had in fact uplifted this to a higher band.
- Regulations 4(2), 4(3) and 4(4) only dealt with the provision of “an annual allowance” without exerting any further influence whatsoever on the satisfaction of the other conditions of Regulation 4(9), regarding eligibility for a lump sum.
- If a person was mentioned in Regulation 4(2), 4(3) or 4(4) by way of having been approved for an annual allowance, the interaction and influence of Regulation 4(2), 4(3) or 4(4) over Regulation 4(9) ends. From that point onwards, Regulation 4(9) exclusively decides the remainder of a person’s entitlement for the provision of a lump sum.
- If a person did not satisfy Regulations 4(2), 4(3) or 4(4), this would primarily affect their annual allowance. The fact that his PIB was not affected in this way rendered the rest of these paragraphs non-influential for the purpose of determining a lump sum under Regulation 4(9).
- Hence, the Adjudicator’s assessment provided these Regulations a more generalised or wide-reaching influence than warranted upon a proper construction of the interplay between them.
- To the extent that a person is being provided “an annual allowance” in accordance with either Regulation 4(2),4(3) or 4(4), the rest of his circumstances do not need to fall into these paragraphs to become eligible for a lump sum, this being exclusively determined by Regulation 4(9). Nor can Regulations 4(2),4(3) or 4(4) restrict anyone from receiving a lump sum, beyond determining a specific point on its eligibility namely whether or not this person is receiving an “annual allowance.”
- The direction taken by the Adjudicator of examining Regulations 4(2),4(3) or 4(4) and making them the central piece of Regulation that will determine the payment of a lump sum, was not the right course. Instead it would have been more logical to restrict the examination of Regulation 4(2), 4(3) or 4(4) to only determine whether he was being paid an annual allowance, then go back to Regulation 4(9) to determine the rest of his eligibility.
- Reference to paragraphs 2, 3 and 4 in Regulation 4(9) was there to exclude those persons who are not receiving an annual allowance. Once a person survived this first step of exclusion, the only next step which needed to be considered for entitlement to a lump sum was subsequent cessation of job, which happened to him on 31 May 2017.

- There was insufficient reasoning for why he was not covered under Regulation 4(4). Termination of his job was not a good enough reason to be excluded from paragraph 4 when he had been accepted for the receipt of PIB throughout. His PIB was still being implemented under Regulation 4(4) despite his termination. Also, the Adjudicator had accepted in her Opinion that anyone covered under Regulation 4(4) was entitled to a lump sum.
 - Nothing in the Regulations mentioned that once a person satisfied a Regulation, Regulation 4(4) in his case, they could subsequently be disqualified or de-qualified from continuing to satisfy it. To suggest so would qualify as re-writing the Regulations and it was not in the gift of either NHS BSA, or the Adjudicator, to re-write the Regulations.
 - He wished for NHS BSA to pay him a lump sum equal to 3/8th of his average remuneration along with 8% interest backdated to 31 May 2017.
17. The complaint has now been passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Dr A for completeness.

Ombudsman's decision

18. Dr A's complaint concerns whether he is entitled to the payment of a lump sum following the termination of employment in May 2017. The Regulations determine a member's entitlement to such a benefit and I agree with the Adjudicator's interpretation of these.
19. Regulation 3(1) deals with the scope of the Regulations. Dr A falls within the scope of Regulation 3(1) because he sustained a psychiatric illness during the course of his role as a practitioner. I understand that there is no dispute on this point.
20. Regulation 4(9) provides that a lump sum can be paid to a person mentioned under Regulation 4(2), 4(3), or under Regulation 4(4) where the person subsequently ceases to be employed by reason of the injury or disease.
21. Considering these Regulations and the circumstances outlined in the background above, it would appear that Regulation 4(2) is most applicable to Dr A in the circumstances. There are two requirements set out in Regulation 4(2). Firstly, the person must fall under Regulation 3(1) and the employment must cease before 31 March 2018 by reason of injury or disease. Dr A satisfies these criteria because he falls under Regulation 3(1) and the second job termination occurred before 31 March 2018.
22. The second requirement is that no allowance or lump sum (other than under Regulations 5 or 5A) has been paid to the person under the Regulations in consequence of that injury or disease. Dr A was not paid a lump sum or allowance under Regulations 5 or 5A, but is in receipt of a lump sum and allowance under

Regulation 4(4), in respect of the same illness, awarded on the first job termination. Hence, he is not entitled under Regulation 4(2) to a lump sum now following the second job termination.

23. For completeness, I will add that Regulation 4(3) does not apply to Dr A because it applies to a person who ceases employment other than by reason of injury or disease. This is not what Dr A is claiming. In any case, if Regulation 4(3) were to apply to him, it contains the same provision excluding any person already in receipt of a lump sum or allowance in respect of the same injury. This would mean that he would not satisfy the criteria in this paragraph for a lump sum anyway.
24. Lastly, I also do not consider that Dr A is entitled to a lump sum under Regulation 4(4); Regulation 4(9) provides that Dr A will need to both fall under Regulation 4(4) and have subsequently ceased to be employed due to ill health. However, Dr A left the second employment and did not return to that employment, so there was no reduction in emoluments as required by Regulation 4(4) subsequent to which his employment then ceased. Accordingly, Dr A does not satisfy Regulation 4(4) when considering his entitlement to a lump sum following the termination of his second job.
25. Dr A has asked two specific questions in his submission. I do not consider these questions pertinent to the matter I am considering, so I will not respond to these points. I have set out my understanding of the Regulations above.
26. I do not uphold Dr A's complaint.

Anthony Arter

Pensions Ombudsman
25 November 2019

Appendix

The National Health Service (Injury Benefits) Regulations 1995

Regulation 4 – Scale of Benefits

(2) Where a person to whom regulation 3(1) applies ceases to be employed before 31st March 2018 as such a person by reason of the injury or disease and no allowance or lump sum, other than an allowance under paragraph (5) or (5A), has been paid under these Regulations in consequence of the injury or disease, there shall be payable, from the date of cessation of employment, an annual allowance of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6) will provide an income of the percentage of his average remuneration shown in whichever column of the table hereunder is appropriate to his service in relation to the degree by which his earning ability is permanently reduced at the date that person ceases that employment.

...

(3) This paragraph applies to a person to whom regulation 3(1) applies who—

(a) ceases to be employed before 31st March 2018 other than by reason of the injury or disease,

(b) at the date of ceasing that employment has not attained normal benefit age,

(c) having ceased that employment, suffers a permanent reduction in earning ability by reason of that injury or disease, and

(d) has not been paid, other than under paragraph (5) or (5A), any allowance or lump sum under these Regulations in consequence of that injury or disease.

...

(4) Where a person to whom regulation 3(1) applies suffers a reduction in the emoluments of an employment mentioned in that regulation before 31st March 2018 by reason of the injury or disease, there shall be payable, from the date of that reduction, an annual allowance—

(a) of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6), will provide an income of the percentage of his average remuneration shown in whichever column of the table in

paragraph (2) is appropriate to his service in relation to the degree by which his earning ability is reduced at the date that his emoluments were reduced; or

(b) of the amount, if any, which, when added to the value, expressed as an annual amount, of any pension specified in paragraph (6)(a), will provide an income at the annual rate at which a pension would have been payable to the person under his relevant pension scheme if, on the day before such reduction, he had ceased to be employed and was incapable of discharging efficiently the duties of his employment by reason of permanent ill-health or infirmity of mind or body;

whichever is the greater:

Provided that regulation 13(4) shall apply to that allowance as if the person had ceased to be employed on the day before his emoluments were reduced and had been re-employed on the following day with the reduced emoluments.

...

(9) A person mentioned in paragraph (2) or (3), or a person mentioned in paragraph (4) who subsequently ceases to be employed as such a person by reason of the injury or disease, shall be entitled to receive a lump sum of the proportion of average remuneration shown in column (2) of the table hereunder in relation to the degree by which his earning ability is reduced.

Table

Degree of reduction of earning ability (1)	Proportion of average remuneration (2)
More than 10% but not more than 25%	One-eighth
More than 25% but not more than 50%	One-quarter
More than 50% but not more than 75%	Three-eighths
More than 75%	One-half