

Ombudsman's Determination

Applicant	Ms Y
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

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

Complaint summary

2. Ms Y has complained that NHS BSA has failed to properly assess her application for Permanent Injury Benefit (**PIB**).

Background information, including submissions from the parties

3. In September 2010, Ms Y, a nurse, sustained a back injury while assisting a patient to sit up in bed.
4. Ms Y attended an occupational health (**OH**) appointment on 15 November 2010. The follow-up letter for this appointment said:

"She told me that she had developed back pain 7 weeks earlier, after assisting a patient to sit up. At first she had sciatic pain to her left leg. She has been having physiotherapy and exercising regularly and the leg pain has now gone. She is using less painkillers than she had required.

I advise that [Ms Y] will be fit to return to work more quickly if a phased return can be arranged..."

5. On 9 October 2013, Ms Y attended an appointment with a Physiotherapy Extended Scope Practitioner (**the Physiotherapist**). The follow-up letter for this said:

"Following your referral [Ms Y] attended complaining of a 2 year history of intermittent back pain. She reported an incident some years ago, a lifting type incident at work, which gave her back and peripheralising left leg pain. Symptoms took some time to settle down, she had some time off work at that time, since then she reported 4 episodes of back pain each generally forcing

her off work...She reported symptoms now generally of low back pain, some intermittent left leg pain, some intermittent paraesthesia in the right leg, back pain her worst issue irritated by activities involving flexion, bending, lifting etc.

...

Diagnostically this is a degenerative low back problem, likely discogenic degeneration with some neutral tissue affect [sic]. The way forward as always in these situations is to attempt to strengthen the structure, increase its flexibility and pace activities that irritate to optimise control. In terms of pacing she needs to work with her line managers and her team on the ward at work to see if she can lessen the repetitive activities that are likely to injure such as repetitive flexion etc, and it may well be best that she moves into a different environment.”

6. Ms Y attended various OH appointments between 2013 and 2017 in relation to her recurrent back pain; she has provided copies of the follow-up letters for these appointments.
7. On 5 September 2017, Ms Y’s employer wrote to her saying that her employment would be terminated on the grounds of incapacity due to ill health.
8. On 20 November 2017, Ms Y applied for PIB.
9. On 11 January 2018, Medigold Health, the organisation providing OH services to NHS BSA, wrote to Ms Y saying that the Scheme’s medical adviser had written to her general medical practice to obtain further details of her medical condition.
10. On 12 February 2018, a GP at Ms Y’s medical practice provided the following response to Medigold:

“1. There is an entry dated 21 September 2010 which states that this lady experienced left sided lower back pain when she lifted a patient five days previously. She was seen on 22 September 2010 and diagnosed with sciatica and certified off work for 7 days. She was reviewed on 28 September and signed off work again for a further week.

2. According to [Ms Y’s] notes, she continues with symptoms of back pain.

3. I am not aware of any other factors that contributed to this injury.

4. There is an entry dated 1 November 2006 in which it is reported that this lady complained of lower back pain.

In May 2010, she again reported problems with her lower back.

5. Ms Y had an MRI of her lumbar and sacral spine on 24 May 2015. According to her notes, she also had a lumbar spine x-ray on 23 June 2014 which revealed moderate to severe spondylotic changes evident at L5-S1 with

subchondral sclerosis and facetar arthrosis. There was also minor scoliosis of the lumbar spine.”

11. On 1 March 2018, Medigold Health wrote to Ms Y saying that its medical advisers had been unable to accept her PIB application as they were unable to conclude that she had “sustained an injury or contracted a disease that is wholly or mainly attributable” to her NHS employment. The main points were:-

- Ms Y had made a claim for a herniated disc which she had said arose due to her assisting a post-operative patient to change position. Ms Y’s claim was that she had issues with her back since then and her employment was terminated as a result.
- The main questions were: (1) was there an injury sustained or disease contracted and (2) was the injury sustained in the course of the person’s employment and wholly or mainly attributable to his/her employment.
- Although there was no objective medical evidence to confirm this or contemporaneous imaging of Ms Y’s spine from September 2010, contemporaneous GP records and later imaging suggested that on balance, Ms Y did sustain a herniated lumbar intervertebral disc at that time. On the balance of probability, Ms Y’s herniated lumbar intervertebral disc was sustained in the course of her employment.
- Biomedical changes take place in the intervertebral discs as one gets older. Although these changes were first identified in Ms Y’s spine in 2014/15, it was likely that they pre-dated the index event as Ms Y had a previous history of back pain, as evidenced by previous medical reports and because “the presence of weakening of the annulus (which occurs as a result of those changes) is a necessary prerequisite for disc herniation.”
- Herniation of an intervertebral disc did not occur unless the annulus was already weakened. The process of herniation could occur in the absence of trauma, although in this instance, an incident did occur which was likely to have contributed to the disc herniation and may have been the precipitating event.
- Based on the evidence presented, Ms Y had not sustained an injury or contracted a disease wholly or mainly attributable to the duties of the NHS employment prior to 31 March 2013. In terms of whether she had suffered a Permanent Loss of Earnings Ability (**PLOEA**) of more than 10% for the purpose of Regulation 4(1) of the NHS Injury Benefit Regulations 1995 (as amended) (**the Regulations**), this had not been considered because attribution for the purpose of Regulation 3(2) had not been met.

12. In June 2018, Ms Y appealed NHS BSA’s decision under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). She made the following comments:-

- There was no copy of the questions asked of her GP.

- There was no evidence that her medical records were examined.
 - Her physiotherapy records had not been examined.
 - No physical/face to face assessment of her condition had been carried out.
13. NHS BSA responded under stage one of the IDRP on 24 July 2018. A different medical adviser assessed the information available but agreed the evidence indicated that Ms Y's back pain predated the "patient handling incident." NHS BSA concurred with this view and concluded that Ms Y's injury did not meet the criteria for PIB.
14. Ms Y appealed the matter again, and another medical adviser's opinion was sought. Their assessment, as contained within the IDRP stage two response, is summarised below:-
- Ms Y had a history of recurrent back pain. It was likely that the degenerative changes noted in 2014/15 predated the index event and the presence of weakening of the annulus was a necessary pre-requisite for disc herniation.
 - Ms Y had a number of episodes of back pain after 2010 which improved with physiotherapy. A number of relapses were noted in the various reports from OH from 2013 to 2017. The MRI scan noted multi-level degenerative changes recognised as being constitutional in nature and thought to be due to genetic and constitutional factors. There was no reason to believe that the degenerative changes in Ms Y's lumbar spine that predisposed her to a disc herniation were a consequence of any single work event or a cumulative effect of her NHS employment.
 - At the stage one appeal, Ms Y had raised concerns that her medical records and physiotherapy records had not been examined. There was a GP report on file (12 February 2018) which answered all the relevant questions relating to Ms Y's history of back pain and the results from the MRI scan. It was not appropriate to obtain Ms Y's full medical records as the evidence already available was sufficient to reach the conclusions that had been made.
 - Concerning her physiotherapy records, in particular, the one dated 9 October 2013 from the Physiotherapist confirmed diagnostically that Ms Y suffers from a degenerative low back problem. A report following an 'initial physiotherapy assessment' from 24 August 2016 reaffirmed information that had previously been noted whereby Ms Y had been diagnosed with a multi-level degenerative condition affecting her lumbar spine with a bulging disc, bone spur on facet joints.
 - It was accepted that Ms Y was suffering from chronic back pain but importantly, the underlying cause was that of a degenerative spinal condition which would not have been wholly or mainly attributable to her work. Therefore, her current chronic back concern was not wholly or mainly attributable to the duties of her NHS employment on or before 30 March 2013.

15. NHS BSA's conclusion in the above IDR stage two decision letter was that the medical evidence showed that Ms Y had a long-standing condition which became symptomatic at work. It said the exacerbation of an underlying condition was not to be considered wholly or mainly attributable to an incident while on duty and there was no evidence that the duties of Ms Y's employment caused her medical condition. It had no reason to disagree with the medical adviser's assessment; the legislative requirements of Regulation 3(2) had not been met and Ms Y was not entitled to PIB.
16. NHS BSA's position is as follows:-
- NHS BSA had correctly considered Ms Y's application for PIB, using the correct test, taking into account relevant evidence and ignoring anything irrelevant. That it weighed the evidence differently or had drawn a conclusion that differed from Ms Y's own opinion was unfortunate but was a finding for it to make on the facts.
 - It had declined Ms Y's application on the basis that the back pain causing her incapacity for work was not wholly or mainly attributable to her NHS employment. It had taken advice from proper sources, considered and accepted that advice and arrived at a decision that it believed was not perverse.
 - The medical evidence showed that the herniated disc was a symptom of her long-standing degenerative disc condition, osteoarthritis, which had previously been symptomatic in both 2006 and 2010.
 - NHS BSA had accepted its medical advisers' recommendations because although the event complained of may have triggered symptoms of pain, this was not the same as saying that the pain symptom was the whole or main cause of the ill-health. The exacerbation of symptoms of a pre-existing injury did not qualify as an 'injury' under the regulations of the Scheme.
17. Ms Y's position is as follows:
- Since 2010 she had suffered a lot of pain and debilitation and at the age of 46 this was mentally and physically very difficult to come to terms with. She had initially reduced her hours in various ways to help cope with her disability. Having her contract subsequently terminated had caused financial loss now and for her future. NHS BSA should take responsibility for this.
 - No osteoarthritis was diagnosed in 2006. This was a muscle problem and she was seen by a Practice Nurse. No X-rays or scans took place until 2015; both diagnosed osteoarthritis. However, a herniated disc was diagnosed in 2010 while she was off sick for nine weeks because of her back injury. This caused subsequent ongoing back pain and was the cause of her NHS employment being terminated in November 2017.
 - She wished to reference the court case NHS Business Services Authority v Mrs Karen Young [2017] EWCA Civ 8.

Adjudicator's Opinion

18. Ms Y'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:-

- It was not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to an applicant's eligibility for PIB. The Ombudsman was primarily concerned with the decision-making process. The issues to consider included: whether the relevant regulations had been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision was supported by the available relevant evidence.
- Medical (and other) evidence would be reviewed in order to determine whether it supported the decision made. However, the weight attached to any of the evidence was for NHS BSA to decide (including giving some of it little or no weight¹). It was open to NHS BSA to prefer evidence from its own advisers; unless there was a cogent reason why it should not (or should not do so without seeking clarification).
- The pertinent legislation in the consideration of Ms Y's PIB application was Regulation 3(2) and 4(1) of the Regulations:

Regulation 3(2):

"This paragraph applies to an injury which is sustained and to a disease which is contracted in the course of the person's employment and which is wholly or mainly attributable to his employment and also to any other injury sustained and, similarly, to any other disease contracted, if -

(a) it is wholly or mainly attributable to the duties of his employment ..."

Regulation 4(1):

"Benefits in accordance with this regulation shall be payable by the Secretary of State to any person to whom regulation 3(1) applies whose earning ability is permanently reduced by more than 10 per cent by reason of the injury or disease ..."

- NHS BSA's medical adviser initially provided their view on the matter in March 2018, but this was appealed by Ms Y and reviewed again during the IDR. The Adjudicator would base her assessment on NHS BSA's second stage IDR conclusion as this was its final response.
- The first consideration was whether the medical adviser at stage two of the IDR was led by the correct questions. The medical adviser set out that the main

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

questions to be addressed were: (1) Was there an injury sustained or disease contracted? and; 2) Was the injury sustained or disease contracted in the course of the person's employment and wholly or mainly attributable to his/her employment?

- Hence, the correct questions, in accordance with Regulation 3(2), had been asked.
- In the medical evidence listed as having been considered by the medical adviser, there were various letters from Ms Y's occupational health physicians, two GP letters and a letter from the Physiotherapist from 2013. These letters covered the timespan between 2010 to 2018 and referenced Ms Y's ongoing struggles with her back.
- The GP letter of 2018 confirmed that Ms Y had suffered from back pain issues in 2006 and May 2010, before the injury in question. The medical adviser's assessment sought to understand to what extent the injury was wholly or mainly attributable to Ms Y's employment. The medical adviser noted that no contemporaneous investigation was taken at the time but accepted from other reports that an injury in the course of Ms Y's employment did take place. In terms of the injury, the medical adviser stated that "the presence of weakening of the annulus is a necessary pre-requisite for disc herniation" but that there was "no reason to believe that the degenerative changes in [Ms Y's] lumbar spine that predisposed her to disc herniation are a consequence of any single work event or a consequence of some cumulative effect of her NHS employment."
- The medical adviser's opinion appeared to be that there would have needed to be a specific type of weakening in the back already present to cause the injury sustained (this being the disc herniation). This appeared to be the medical adviser's main basis for reaching his or her view. The Adjudicator could see no reason for NHS BSA to have further questioned this.
- The medical adviser did reference specific reports in their assessment, such as the 2013 Physiotherapist's Report and a 2016 report following an initial physiotherapist assessment, but said that this supported the assessment that Ms Y has a degenerative condition. Ms Y had suggested that the Physiotherapist's Report supported the seriousness of her back condition, which she deemed attributable to the 2010 injury. However, NHS BSA had been led by and had given weight to the medical adviser's assessment in respect to attribution. The Adjudicator did not consider this unreasonable, especially given the nature of the injury and lack of contemporaneous documentation.
- Ms Y had pointed out that she was not diagnosed with osteoarthritis, which NHS BSA had stated in its response to The Pensions Ombudsman's Office. The Adjudicator agreed that this term had not been used by any of the medical advisers in relation to Ms Y's condition prior to September 2010, adding that she was not qualified to give an opinion as to whether it was reasonable to apply this

term to Ms Y's back complaints prior to then. In any case, NHS BSA's use of this term in reference to these incidents took place after the PIB application process.

- Ms Y had also made reference to the case of NHS Business Services Authority v Mrs Karen Young. However, in this case it was accepted that Mrs Young had sustained an injury that was wholly or mainly attributable to her NHS employment. The application had been declined on the grounds that Mrs Young had not suffered a PLOEA in excess of 10% because the effects of her injury were not permanent. In the Adjudicator's Opinion, the principle issue in that case was the meaning of the phrase "by reason of the injury" in Regulation 4(1), so it was not relevant to Ms Y's complaint. As it had been determined that Ms Y did not meet the first criteria in terms of Regulation 3(2) concerning attribution, PLOEA was not considered.
- NHS BSA had correctly applied the Regulations in assessing Ms Y's PIB application.
- Ms Y had mentioned a future medical assessment which she felt might be relevant to her current complaint. Ms Y had not provided any further detail on this assessment. The Adjudicator said that on the basis of what she understood of this assessment, it would have no bearing on whether NHS BSA's previous decision, this being NHS BSA's decision at stage two of the IDRP, was carried out correctly.

19. NHS BSA accepted the Adjudicator's Opinion. Ms Y did not accept it and made the following comments:-

- She felt the Adjudicator had taken the same view as Medigold.
- She had not received a balanced view and the Adjudicator had stated that she had no medical training in order to be able to comment on such matters.
- The Adjudicator's opinion was weighted in NHS BSA's favour; it had made a decision without a physical examination of her.

20. The complaint has now been passed to me to consider. I agree with the Adjudicator's Opinion and note the additional points made by Ms Y.

Ombudsman's decision

21. I am sympathetic to the position which Ms Y finds herself in and understand that her chronic back condition has had a significant impact on her life. I also take into account Ms Y's comments on her condition and how it has developed.
22. My role is to consider whether the process undertaken by NHS BSA in determining Ms Y's eligibility for PIB was carried out correctly. A difference in opinion between the applicant and the decision-maker, in this instance NHS BSA, does not in and of itself indicate that there was a flaw in the process carried out.

23. I am satisfied that the medical adviser at stage two of the IDRPs asked the correct questions when carrying out their assessment on Ms Y's injury and forming their conclusions. In their assessment, the medical adviser referenced relevant medical reports with the view to understand whether the injury sustained by Ms Y was wholly or mainly attributable to her employment. Having considered these reports, the medical adviser's opinion was that the underlying cause of Ms Y's condition was "that of a degenerative spinal condition which would not have been wholly or mainly attributable to her work." Although Ms Y disagrees with this assessment, I cannot find any errors in the process undertaken in making this decision. NHS BSA accepted the medical adviser's opinion and I can see no cogent reason for it not to have done so, given the facts and analysis presented.
24. Ms Y has said that she does not feel that she received a balanced view from the Adjudicator, who also did not have medical training. However, the Adjudicator's role was not to re-assess the medical information which had been presented to NHS BSA and then form her own conclusions on Ms Y's eligibility for PIB. The Adjudicator's role was to consider the decision-making process undertaken by NHS BSA (and the medical advisers it relied upon). Medical training is not required for this exercise. I do not agree that the incorrect approach was taken here.
25. Ms Y has complained that NHS BSA's decision was made without a physical examination of her. Such an examination is not required by the Regulations and the medical adviser took into account the reports of specialists who had examined her.
26. I do not uphold Ms Y's complaint.

Anthony Arter

Pensions Ombudsman
6 November 2020