CAS-62200-F1C6

Ombudsman's Determination

Applicant:	Mr R
Scheme:	NHS Injury Benefit Scheme
Respondents:	NHS Business Services Authority **(NHS BSA**)
	NELFT NHS Foundation Trust (**NELFT**)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by NHS BSA or NELFT.

Complaint summary

2. Mr R has complained that his application for a permanent injury benefit (**PIB**) has been declined.

Background information, including submissions from the parties

Background

3. Mr R was employed in the NHS until August 2019 when he retired on the grounds of ill health. Mr R had been on long-term sickness absence since September 2018. In December 2019, he applied for a PIB in connection with a back injury sustained in 2010.

4. The relevant regulations are The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended) (the **1995 Regulations**). At the time Mr R's employment ceased, Regulation 3 provided:

> "3 Persons to whom the regulations apply
>
> (1) Subject to paragraph (3), these Regulations apply to any person who, while he -
>
> (a) is in the paid employment of an employing authority; …

(hereinafter referred to in this regulation as "his employment"), sustains an injury before 31st March 2013, or contracts a disease before that date, to which paragraph (2) applies.

(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; …

(3) These Regulations shall not apply to a person -

(a) in relation to any injury or disease wholly or mainly due to, or seriously aggravated by, his own culpable negligence or misconduct; …"

5. Regulation 4 provided:

"4 Scale of benefits

(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 …"

6. On 11 November 2019, NELFT wrote an open letter in support of Mr R's application. Among other things, NELFT stated that it had been unable to trace an accident report for the 2010 incident. It explained that, at its request, Mr R had provided a print from his GP record for 28 June 2010. This states:

"Was on night duty, has [*sic*] a "near fall" while climbing down the stairs. Was okay but developed back pain about 3 hours later. Now has severe low back pain. Had some pain killer but did not get any relief. Still in very severe [pain] and has has [*sic*] difficulty walking."

7. NELFT also said it had agreed to award Mr R a temporary injury allowance (**TIA**) for a period of reduced pay between February and July 2017 and a further period between July and September 2017. It said a further TIA had been paid for a period of absence starting in September 2018.

8. First instance decisions about PIB are made by the Scheme's medical advisers, Medigold Health (**Medigold**) under delegated authority. Medigold wrote to Mr R, on 9 March 2020, declining his application on the grounds that its medical adviser (**MA**) had been unable to conclude that he had sustained an injury, or contracted a disease, which was wholly or mainly attributable to his NHS employment. It quoted the advice from the MA who had reviewed Mr R's application. A summary of and extracts from the medical evidence relating to Mr R's case are provided in the Appendix.

9. Mr R submitted an appeal under the two-stage internal dispute resolution procedure (**IDRP**). NHS BSA issued a stage one decision, on 22 June 2020, declining Mr R's appeal. It said:

> "I have carefully considered all the evidence held which includes your statement and the evidence you have kindly provided, together with the recommendation received from the Scheme's medical adviser. My decision is that although I am satisfied that the injury for which you have claimed Permanent Injury Benefits is wholly or mainly attributable to your NHS employment, the medical adviser does not consider that you have suffered a permanent loss of earnings ability of more than 10% by reason of the injury."

10. NHS BSA also explained that the criteria for a PIB award were different from the criteria for disability benefits or Industrial Injuries Disablement Benefit. It explained that Mr R's case had been referred to the Scheme's MA and quoted the advice it had received (see Appendix).

11. NHS BSA issued a stage two decision on 12 January 2021. It said it had taken advice from the Scheme's MA and undertaken a full review of Mr R's application. NHS BSA said it agreed with the MA that Mr R had sustained an injury to his back in the course of his NHS employment and that this was wholly or mainly attributable to his NHS employment. It confirmed that a road traffic accident which Mr R had referred to could not be considered because it had occurred after 31 March 2013. NHS BSA said it agreed with the MA that Mr R's back injury had not caused him to suffer a permanent loss of earnings ability (**PLOEA**). It declined his appeal. NHS BSA then quoted the advice it had received from the MA (see Appendix).

Mr R's position

12. Mr R submits:-

- Since his injury he has tried to continue to work. Despite returning to work, he was not without discomfort and this led to a change to a lower paid role.
- The reduction in his salary meant that he was unable to meet his financial obligations and he incurred debt, including borrowing from loan companies, family and friends.
- He was pressurised into taking ill health retirement.
- Although the MRI scan showed degenerative disease, he had not had any symptoms until his accident. He does not agree that his injury could have been sustained elsewhere or that it was a soft tissue injury which could be expected to heal. He describes his accident as a fall from a missed step on a steep staircase with an aggressive twist and turn as he struggled to save himself. He suggests that the accident could have ended in a fatality if he had hit his head on the concrete steps.

- He had no history of back pain and had never experienced any back injury of any sort. NHS BSA failed to look at his medical history prior to his accidents. His GP notes show that his attendance on 28 June 2010[1] was the first presentation of his reported problem.

- The initial MRI scan confirmed that he had sustained multiple slipped discs involving L2, L3 and L4. The already pinched nerves could only become worse as a result of his skeleton and muscles accommodating the ongoing pain. This was bound to lead to further deterioration in his skeletal structures as revealed by subsequent scans. It is the back pain from the initial fall which he continues to suffer. He is unable to sit for more than an hour or stand for more than 45 minutes to one hour.

- He disagrees that he did not see his GP until three to five days after the accident. The accident occurred on the night of 27 June 2010 and he saw his GP on the morning of 28 June 2010. This was three hours after he had finished work when his back went into spasms and he suffered unbearable pain.

- He does not agree that he has bone disease. Any scan of someone in his age group would be expected to identify changes in bone structure.

NELFT's position

13. NELFT submits:-

- PIB is administered and decided upon by NHS BSA. It is applied for by the individual themselves. It has no control over or influence on the decision. Its role is limited to ensuring that the individual is aware of their right to apply for PIB and providing support for the application. It did this in Mr R's case.

- It rejects Mr R's claim that he was pressurised into taking ill health retirement. Ill health retirement was explored as part of an occupational health assessment as a standard question. Mr R's union representative asked it to support the ill health option and there is no evidence that any representative of NELFT threatened or pressurised Mr R. This concern has never been raised by Mr R or his union representative. Ill health retirement was discussed as an option in line with normal employment processes for those on long-term sick leave.

- It was not made aware of Mr R's "near fall" until 2017. There is no record of Mr R reporting the incident via the incident reporting management system. There is no record of Mr R needing to take time off following the incident. It cannot reasonably investigate, respond to or mitigate an incident it has not been made aware of.

- It made reasonable enquiries to corroborate the incident, including checking databases and paper records.

[1] GP note for 28 June 2010 states: "Low back pain (*first*)"

- Mr R's wages did reduce. This was because he had requested to work part-time in order to undertake a course to retrain as a mental health nurse.

- There was a delay in submitting Mr R's retirement forms and a goodwill payment was made to him.

NHS BSA's position

14. NHS BSA submits:-

- Mr R's application for PIB has been consistently rejected on the grounds that the medical evidence demonstrates that, whilst he suffered an injury which is wholly or mainly attributable to his NHS employment in 2010, the injury was not an operative cause of his PLOEA.

- Mr R also suffered a road traffic accident whilst on duty in 2016. This cannot be taken into account because the accident occurred after the closure of the Injury Benefit Scheme.

- There are no incident reports, but it is satisfied that the 2010 incident did occur. It is satisfied that the injury caused minor and short-lived exacerbation of symptoms of Mr R's underlying health condition, which is degenerative disease of the spine. This disease was evident in an MRI scan. However, it is also satisfied that the incident was not an operative cause of PLOEA in 2017.

- It is not disputed Mr R has suffered severe debilitating pain since 2017. However, it does not agree the 2010 incident was an operative cause of his PLOEA. Mr R continued to work after the 2010 incident and only suffering a PLOEA when he reduced his hours in 2017; some seven years after the 2010 injury.

- It is only able to make decisions based on the evidence supplied. It disagrees with Mr R that it has failed to look at all of the medical evidence which has been supplied. It has thoroughly and independently considered all of the evidence on three separate occasions. No evidence has been supplied relating to the period before June 2010. Only the GP records from 2010 have been provided. There is then a gap in medical treatment until 2017, when Mr R's road traffic accident occurred.

- It was asked to consider a PLOEA from 2017. Mr R's claims that he changed roles prior to this due to ill-health are unsubstantiated and based on his recollection alone.

Adjudicator's Opinion

15. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA or NELFT. The Adjudicator's findings are summarised below:-

15.1 Members' entitlements to injury benefits were determined by the scheme rules or regulations. The scheme rules or regulations determined the circumstances in which members were eligible for injury benefits, the conditions which they had to satisfy, and the way in which decisions about ill health benefits had to be taken.

15.2 In Mr R's case, the relevant regulations were Regulation 3 and Regulation 4 in the 1995 Regulations (see paragraphs 4 and 5 above). Briefly, in order to qualify for a PIB, Mr R had to satisfy the following conditions:-

- He had sustained an injury, or contracted a disease, in the course of his NHS employment which was wholly or mainly attributable to that employment; or
- He had sustained an injury, or contracted a disease, which was wholly or mainly attributable to the duties of his NHS employment; and
- By reason of the injury or disease, his earning ability had been permanently reduced by more than 10%.

15.3 The initial decision as to whether Mr R qualified for a PIB was made by Medigold under a delegated authority. This was provided for under Regulation 21A of the 1995 Regulations. The two appeal decisions were made by NHS BSA acting on behalf of the Secretary of State under Regulation 22. NELFT had no role to play in the decision-making process.

15.4 Both Medigold and NHS BSA had agreed that Mr R had sustained an injury in the course of his NHS employment which was wholly or mainly attributable to that employment. However, they did not agree that Mr R's earning ability had been permanently reduced by more than 10% by reason of the injury. In other words, they did not agree that Mr R satisfied the requirements of Regulation 4(1).

15.5 The interpretation of Regulations 3 and 4 had been considered by the Courts on a number of occasions and the Adjudicator noted that Medigold's MA, in the initial decision, had referred to the relevant cases. The Courts had decided that a qualifying injury need not be <u>the</u> operative cause of the person's PLOEA; it was sufficient that it was <u>an</u> operative cause. In other words, it was not a bar to receiving a PIB if the person had other medical conditions which contributed to their PLOEA. Both the MAs and NHS BSA had this in mind when considering Mr R's case.

15.6 Mr R's position was that, in June 2010, he had sustained an injury to his back and he continued to suffer pain relating to that injury. In other words, Mr R was of the view that the injury he had sustained in 2010 was an operative cause of his current PLOEA; that is, the 2010 injury continued to contribute to his PLOEA.

15.7 The MAs had advised that the injury which Mr R had sustained in 2010 had been a soft tissue injury which most likely had resolved within a period of around six months. In other words, they did not agree that the 2010 injury was now contributing towards Mr R's PLOEA.

15.8 The Adjudicator noted that, in the initial decision, the MA had also considered whether the injury which Mr R had sustained in 2010 was a prolapsed disc. They had explained that prolapsed discs were not usually caused by trauma; unless the trauma was extreme. They had said an already weakened disc was usually present and this could prolapse spontaneously or under trauma. The MA had suggested that, because the 2010 incident had not involved extreme trauma to Mr R's back and an MRI scan had shown degenerative change in his back, the prolapsed disc had been caused more by the presence of a weakened disc than by Mr R's fall. On that basis, the prolapsed disc could not be said to be wholly or mainly attributable to Mr R's NHS employment. The term "wholly or mainly" required a contribution in excess of 50%.

15.9 In *Stewart v NHS Business Services Authority* [2018] EWHC 2285 (Ch), the judge had set out five steps which should be gone through in making a decision under Regulation 3(2). The first of these was to identify the injury or disease in question. There was no definition of injury in the 1995 Regulations but the Courts had said that an injury was a physiological or psychological change for the worse[2]. The Courts had found the injury: "should be kept separate from the loss of faculty or the impairment in the normal power or function of some part or organ of the body that might result from the injury either alone or in conjunction with other causes". Under the 1995 Regulations the "wholly or mainly" test only applied to the connection of the injury to employment.

15.10 If Mr R had sustained a prolapsed disc at the time of his 2010 accident, the fact that he was more vulnerable to this happening because of a weakened disc would not be relevant. The fact would remain that Mr R had experienced a physiological change for the worse at the time of the 2010 accident. The MA would need to separate the injury (a disc prolapse) from the impairment in the normal function of Mr R's lumbar spine (degenerative disease). The analysis as to the relative contributions from a weakened disc and the accident did not address the correct question under Regulation 3.

15.11 However, having considered possible causation for a prolapsed disc, the MA had noted that there was no evidence on imaging of any injury or other pathology in Mr R's lumbar spine which was attributable to the 2010 incident. They appear to have settled on the 2010 injury being a soft tissue injury and this stance had been continued in the two appeal reviews.

[2] *Young v NHS Business Services Authority* [2015] EWHC 2686 (Ch)

15.12 Having decided that Mr R had sustained a soft tissue injury in 2010, the MAs had advised that this had probably healed within six months of the accident. They had referred to an occupational health report, dated 15 September 2017, in which Mr R had been reported as feeling pain free and having a full range of pain free lumbar movements.

15.13 So far as their medical opinions were concerned, the MAs did not come within the Pensions Ombudsman's jurisdiction. They were answerable to their own professional bodies and the General Medical Council. The question for the Pensions Ombudsman was whether there had been any reason why a decision should not have based upon the advice provided by the MAs. The Pensions Ombudsman had previously acknowledged that a decision-maker could only be expected to review medical advice from a lay perspective; they were not expected to challenge a medical opinion per se. The kind of things the decision-maker could be expected to look out for were errors or omissions of fact, a misunderstanding of the relevant rules or regulations or reference to an irrelevant matter on the part of the MA.

15.14 The Adjudicator said she had not identified any error or omission of fact on the part of the MAs. She noted Mr R's disagreement with the timing of his 2010 GP attendance referred to in the initial decision. In her view, this had not impacted on the MA's overall analysis. It was clear that both the MAs and NHS BSA had had the correct interpretation of Regulations 3 and 4 in mind and had been aware of the Courts' views on this. The Adjudicator said she had not seen any evidence that any irrelevant matters had been considered. Mr R disagreed with the MAs' view that he had sustained a soft tissue injury in 2010 which had since healed. However, this view did not appear to be inconsistent with the available evidence. In particular, it was consistent with the fact that Mr R had continued to work up until 2018 and had been reported as pain-free in 2017. There appeared to be no reason why Medigold and NHS BSA should not have based their decisions on the advice from the MAs.

15.15 In his submission to the Pensions Ombudsman, Mr R had said he felt pressurised into taking ill health retirement. The decision to terminate Mr R's employment and the capability procedure undertaken by NELFT did not come within the Pensions Ombudsman's jurisdiction. They were employment matters and had not been considered as part of the investigation into Mr R's complaint.

16. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R provided further comments which are summarised below. I have considered Mr R's comments, but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Mr R's further comments

17. Mr R submits:-

- His role, during his NHS employment, had to be changed in order to accommodate his daily back pain. This pain eventually led to his unplanned retirement.
- The primary cause of his incapacity is impingement of a nerve caused by a bulging disc. This occurred as a result of the fall he had in June 2010. He had no history of back pain prior to the fall. A bulging disc is not a soft tissue injury and it will not resolve itself.
- Everyone develops changes to their bones as they age. This does not necessarily lead to pain. Since his fall in 2010, he has lived with pain. This pain obviously results from a pinched nerve, which is a consequence of a bulging disc sustained during his fall in 2010.
- His difficult financial situation has been compounded by the current economic situation and the high cost of living.

Ombudsman's decision

18. In order for Mr R to qualify for a PIB, he has to satisfy the conditions set out in Regulations 3 and 4 in the 1995 Regulations. Namely:-

- He has sustained an injury, or contracted a disease, in the course of his NHS employment which is wholly or mainly attributable to that employment; or
- He has sustained an injury, or contracted a disease, which is wholly or mainly attributable to the duties of his NHS employment; and
- By reason of the injury or disease, his earning ability has been permanently reduced by more than 10%.

19. In *Stewart*, the judge said that the first step was to identify the injury or disease in question. Mr R argues that the injury, in his case, is a bulging disc causing impingement of a nerve and leading to ongoing pain. He argues that he sustained the bulging disc at the time of his fall in 2010. The Scheme's MAs came to a different conclusion. They were of the view that, in 2010, Mr R sustained a soft tissue injury to his back which they thought likely to have healed within six months of his fall.

20. It is not my role to review the medical evidence and come to a decision of my own as to Mr R's eligibility for a PIB. My role is to consider the decision-making process undertaken by Medigold and NHS BSA. If I were to find that the decision-making process was flawed, the appropriate course of action would be for me to remit the decision to NHS BSA for it to be retaken.

21. In order to determine whether the decision not to award a PIB to Mr R was taken in a proper manner, I have considered whether Medigold and NHS BSA have: (i) gone about making the decision in the right way; and (ii) made a decision which is supported by the evidence.

22. With regard to making the decision in the right way, Medigold and NHS BSA were required to interpret and apply the relevant regulations correctly, and obtain and consider sufficient appropriate evidence.

23. I find that both Medigold and NHS BSA had the correct interpretation of Regulations 3 and 4 in mind when assessing Mr R's eligibility for a PIB. I note that the MA advising on the initial decision referred specifically to the Courts' judgments in *Stewart* and *Young*. They then proceeded to consider the nature of the injury which Mr R had sustained in 2010; that is, they took steps to identify the injury in question. Mr R disagrees with the MA's conclusions but the process by which the MA reached their conclusions was correct. The same approach was adopted at the appeal stages.

24. Regulation 21A provides for the Secretary of State to make arrangements for a decision concerning an application for a PIB to be made by a registered medical practitioner, or a body employing such medical practitioners. Unlike with some public sector schemes, there is no specific reference to obtaining medical advice/opinion before a decision is made. However, given the nature of the decision, I find that it was appropriate for medical advice to be sought before a decision was made about Mr R's application for a PIB.

25. My Adjudicator explained that the MAs, so far as their medical opinions are concerned, do not come within my jurisdiction. Neither I nor NHS BSA are in a position to question a medical opinion; we can only review the medical advice from a lay perspective. This is why I have emphasised the fact that I am looking at the process by which the MA reached their opinion; not the opinion itself.

26. I note that the Scheme's MAs had been provided with reports from Mr R's GP and his treating physicians, together with scan results and his occupational health records. The evidence considered dated from 2010 to 2018. I find that this was appropriate evidence for the assessment of Mr R's application for a PIB. I have not identified any error or omission of fact on the part of the MAs in their review of the available evidence. I note Mr R's concern that one of the MAs referred to him having visited his GP three days after his fall. However, I do not find that this affected the outcome of the MA's assessment.

27. There was no reason why either Medigold or NHS BSA should not have relied on the advice from the Scheme's MAs in making a decision on Mr R's application for a PIB.

28. The decision not to award a PIB is consistent with the advice from the MAs that Mr R sustained a soft tissue injury in 2010 which would have healed within six months. For Mr R to qualify for a PIB, the 2010 injury would have to still be an operative cause of his continuing incapacity, which the MAs advised was not likely to be the case. I have

acknowledged Mr R's disagreement with the MAs' opinion but I do not find that it was maladministration for the decision to be based upon this advice.

29. Therefore, I do not uphold Mr R's complaint against NHS BSA.

30. With regard to Mr R's complaint against NELFT, I find that it had no role to play in the decision-making process relating to his application for a PIB. NELFT provided a supporting letter for Mr R's application but this was as much as it could do as an employer. I do not uphold Mr R's complaint against NELFT.

Anthony Arter
Pensions Ombudsman

25 July 2022

Appendix

Medical evidence

31. The initial advice from the SMA

The SMA said they had considered the following evidence:-

- Referral documents;
- Emails and statements from Mr R;
- NELFT's statements of 11 November 2019;
- Reports from Mr R's GP dated 12 June 2018 and 20 May 2019;
- Reports from: a consultant in pain medicine dated 11 April 2019; a consultant neurosurgeon dated 3 March 2017; another consultant in pain management dated 26 June 2017, 17 September, 26 and 31 October, and 15 December 2018, and 4, 19 and 25 January 2019, and a consultant neurologist dated 23 June 2016;
- Occupational health reports dated 25 January, 14 February, 10 March, 13 June and 15 September 2017, and 21 and 25 February 2019;
- AW33E, Part C.

The SMA explained that they had written to Mr R's GP but had received no response. They said there were no other clinicians who were likely to hold information which was contemporaneous with the 2010 incident. They said they had considered offering Mr R a consultation but that this would only provide information about his current circumstances, so they had decided to proceed on the basis of the information already held.

With regard to the 2010 incident, the SMA noted that no contemporaneous documentation had been provided. They said accounts of the incident indicated that Mr R had missed a step whilst descending a staircase and fallen backwards. They said Mr R did not appear to have actually fallen to the ground but it was likely that he twisted during the incident. The SMA noted that Mr R had been able to continue with his duties but was reported to have had back pain by the end of his shift. They noted that Mr R had indicated that a colleague had witnessed the incident, but that no witness statement had been provided. They also noted that no accident report had been located. The SMA said they had no reason to doubt Mr R's account and noted that it was supported by NELFT.

The SMA referred to two recent Court judgments[3]. They explained that they would begin by considering the disease in question. They said, from Mr R's description, the

[3] *Stewart v NHS Business Services Authority* [2018] EWHC 2285 (Ch) and *Young v NHS Business Services Authority* [2015] EWHC 2686 (Ch). The latter was appealed, see *NHS Business Services Authority v Young* [2017] EWCA Civ 8.

most probably scenario was that he had sustained a soft tissue injury. They said it was plausible that some spinal rotation had taken place and Mr R could have sustained a prolapsed intervertebral disc. The SMA agreed that the injury had occurred in the course of Mr R's employment.

With regard to whether Mr R's was the whole or main cause of the disease being contracted, the SMA said this depended upon what was considered to be the nature of the injury sustained. They said, if the injury was a soft tissue injury, it would have been wholly attributable to the incident described because of the relatively close temporal relationship with the onset of symptoms and there being no indication of any other contributing incident. They said, if the injury was a prolapsed disc, there was a close temporal relationship with the onset of symptoms and no other contributing incident, but the role of trauma in the development of a prolapsed disc was a matter of debate.

The SMA explained the mechanism behind disc herniation and said it did not occur unless the disc was already weakened. They said disc herniation could occur in the absence of trauma but, in Mr R's case, an incident had occurred which was likely to have contributed to the disc prolapse and may have precipitated it. The SMA said, if the injury was a prolapsed disc, it most likely occurred because of a combination of factors. They expressed the view that, because a weakened disc was necessary for it to herniate and the incident described would not have been sufficient in itself to give rise to a prolapsed disc, the weakened disc was the main cause.

The SMA accepted that an alternative argument could be made that, since the disc prolapse would have been unlikely to have occurred at the time it did without the incident, the incident was the main cause. They said that the fact that trauma (unless extreme) was not a sufficient cause in itself and the incident, as described, did not involve extreme trauma was supportive of the view that the weakened disc was the main cause of a prolapsed disc in Mr R's case.

The SMA said there was no indication that Mr R considered the disc prolapse had arisen as a result of a cumulative effect of his NHS employment and they had no medical reason to believe this was the case.

With regard to a PLOEA, the SMA said a soft tissue injury would have been expected to fully resolve. They said there was no evidence on imaging of any injury or other pathology in Mr R's lumbar spine which was attributable to the 2010 incident. They said it followed that any soft tissue injury sustained in 2010 had not given rise to a PLOEA. The SMA concluded:

> "There is no doubt that the applicant has degenerative changes in his lumbar spine. Dr Ather confirmed in his report of 26 June 2017 that imaging of the applicant's spine shows degenerative changes at multiple levels. These degenerative changes are constitutional in origin. They are not a consequence of the incident in June 2010. While I have no doubt that the applicant does indeed have ongoing symptoms and that he does have a PLOEA as a result of

these ongoing symptoms, these symptoms are the result of the degenerative changes in his spine. The applicant's PLOEA is a consequence of the degenerative changes. Any soft tissue injury sustained in June 2010 would not be an operative cause of his PLOEA."

32. The SMA at stage one of the IDRP

The SMA noted that the previous SMA had advised that the injury on duty in 2010 was likely to have been a soft tissue injury which would have resolved within six months and, hence, there was no PLOEA attributable to it. They listed the medical evidence they had considered. In addition to the evidence listed in the initial decision, the SMA referred to:-

- The report by the previous SMA;
- A report from another SMA relating to Mr R's ill health retirement;
- A report from Mr R's GP, dated 16 March 2020, including a copy of the GP records for the period 28 June to 10 December 2010;
- A report from a consultant in pain management dated 2 June 2017; and
- A report from a consultant radiologist, dated 25 March 2018, relating to an MRI scan of Mr R's cervical spine.

The SMA said they had also reviewed the medical evidence listed by the previous SMA.

The SMA said the available evidence showed that Mr R had injured his back at work. They said the evidence showed that Mr R reported to his GP shortly afterwards that he had had a "near fall" and, whilst initially "Ok", had developed severe back pain about three hours later.

The SMA expressed the view that Mr R had sustained a soft tissue injury to the structures around his lumbar spine when he missed a step on a staircase on 25 (*sic*) June 2010. They acknowledged that Mr R had been on duty at the time and said the injury was wholly or mainly attributable to his employment.

The SMA said the GP record showed that Mr R had attended the surgery complaining of lower back pain for the first time on 28 June 2010; some three days after the accident[4]. They noted that Mr R had continued to attend the surgery regularly and obtained sick notes for a number of months. The SMA noted that Mr R had been referred for an MRI scan in December 2010 because of worsening pain in his lower back. They noted that the MRI scan had shown multi-level degenerative disease in Mr R's lumbar spine, mainly at L3/4 and L4/5, with entrapment of a nerve and Mr R had been referred to a specialist.

[4] Mr R disagrees with this timescale.

The SMA expressed the view that the degenerative disease (osteoarthritis) shown on the MRI scan would have taken many years to develop and was highly unlikely to have been caused by nearly falling on a staircase five and a half months earlier. They said osteoarthritis was usually a genetically caused condition which became more apparent as the person aged. The SMA noted that an MRI scan in May 2018 had shown that osteoarthritis was affecting the cervical vertebral joints between C4 and C5 and impinging on a nerve. They said there was no evidence to show that Mr R's cervical spine had been injured in the 2010 accident.

The SMA referred to the GP's note of 28 June 2010. They noted that the GP had recorded Mr R's spine as normal with tenderness in the lower right back. The SMA noted that there had been no signs of the nerves of the lower spine being affected and no redness, swelling or bruising, which they would have expected if there had been recent damage to the lower spine structures. They commented that the delayed onset of pain, some three hours after the accident, was typical of an inflammatory response to a strain injury to a soft tissue structure.

The SMA expressed the view that it was unlikely that a near fall on a staircase which did not involve a fall or any direct impact on the spine would have caused a significant injury to the lumbar spine. They thought it more likely that the long-standing degenerative changes in Mr R's spine had been made symptomatic by the inflammatory response in the injured soft tissues. They said the majority of soft tissue injuries resolved within six months. The SMA expressed the view that Mr R's ongoing pain arose from the degenerative changes in his lumbar spine and not from the original soft tissue injury.

The SMA acknowledged that Mr R had seen a significant reduction in his income as a result of lower back pain and pain in his neck and shoulder since June 2010. However, they said, in their opinion, this had not arisen from the injury sustained in June 2020 because it was likely that this was a soft tissue injury which had resolved within the following six months. The SMA explained that they had not considered whether the June 2010 injury was an operative cause for a PLOEA, for the purposes of Regulation 4(1), because the attribution requirement in Regulation 3(2) had not been met.

33. The SMA at stage two of the IDRP

The SMA listed the documents they had considered. In addition to those considered initially and at stage one, the SMA referred to:-

- Referral documents and personal statements relating to the original application and IDRP appeals;
- GP letters dated 12 June 2018 and 20 May 2019;
- A report from a consultant in pain management dated 4 April 2019;
- MRI scan of Mr R's neck dated 25 May 2018.

The SMA said the questions they were required to address were:-

- Was there an injury sustained or a disease contracted?
- Was the injury sustained (or disease contracted):

  (a) in the course of the person's employment, and

  (b) wholly or mainly attributable to their employment?

The SMA noted that NELFT's statement had indicated that no formal injury report had been submitted at the time of Mr R's fall in 2010. However, they went on to note that the GP's record, dated 28 June 2010, referred to a near fall whilst on duty and that Mr R went on to develop back pain in the following three hours. They noted that Mr R's back pain had increased in severity, he had difficulty walking but no signs of neurological impingement, he had a normal spine but was tender on his right side, and there was no other neurological deficit. The SMA noted other GP consultation in 2010 and that an MRI scan, in December 2010, had shown multi-level degenerative lumbar spine disease.

The SMA referred to sickness absence data. They noted that this only appeared to be reliable after 2015.

The SMA provided a review of the medical evidence and outlined the treatment Mr R had received starting in 2016. They noted that most of the correspondence indicated chronic low back pain. The SMA referred to an occupational health report, dated 15 September 2017, in which Mr R had been reported as feeling pain free and having a full range of pain free lumbar movements. The SMA said:

> "This medical evidence indicates that [Mr R] has spondylosis of his spine, which initially became symptomatic in the lumbar region and subsequently in the neck. MRI scans are all consistent in showing degrees of degeneration within the intervertebral discs and facet joints. It must be noted that the proportion of the population that demonstrates degenerative changes on MRI scans progressively increases through life, with the maximum incidence of onset of pain as a result of these degenerative changes occurring in the sixth decade. Onset of symptoms can very often be aligned with minor injuries, but equally can be spontaneous. The normal expression by a Specialist Spinal Orthopaedic Surgeon is that an incident or injury can represent a marginally earlier onset of back symptoms, whereas in the absence of particular minor injury, the symptom onset would have been a handful of years later, but in any event highly likely due to the natural history of constitutional degeneration anyway.
>
> The evidence does indicate that [Mr R] sustained a slip whilst going down a set of dark stairs and he describes twisting whilst trying to catch himself and a build-up of pain in the following hours and the GP noted right sided tenderness. This would be entirely consistent with a soft tissue strain. The

> nature of soft tissue injuries and indeed injuries of soft tissues around degenerative structures is that they would then go through a healing process. The evidence is clear that [Mr R] does have degenerative spine disease."

The SMA expressed the view that the evidence indicated that Mr R had sustained a soft tissue injury in 2010, which would then have gone through a healing process. They said they regarded Mr R's degenerative spine disease as having become symptomatic following his slip on the stairs, but noted that it was asymptomatic in 2017. The SMA said this was supportive of there having been a recovery of the soft tissue injury. They said the soft tissue injury sustained in 2010 was wholly or mainly attributable to Mr R's employment, but his degenerative spine and chronic low back pain was not. The SMA recognised that the soft tissue injury might have been a triggering factor in the onset of Mr R's symptoms. They advised that, because Mr R's degenerative spine was not wholly or mainly attributable to his employment, they had not considered a PLOEA as a result of this pathology.