

Ombudsman's Determination

Applicant	Dr R
Scheme	NHS Injury Benefit Scheme
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

1. Dr R's complaint is upheld and to put matters right NHS BSA shall within 7 days of the date of this Determination pay Dr R £500 for distress and inconvenience caused and within 28 days reconsider Dr R's application for a Permanent Injury Benefit (**PIB**).
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Dr R's complaint is that he has been incorrectly refused a PIB.
4. Among other things, Gordons Partnership (who are representing Dr R) say:
 - Dr R's complaint is primarily in respect of his stage two internal dispute resolution (**IDR**) appeal.
 - NHS BSA have never addressed the significance of the Coroner's inquest and its possible contribution to Dr R's mental health incapacity.
 - NHS BSA were wrong to narrow Dr R's eligibility for a PIB to the period only of the rescue. Consideration should be given for the entire period he was working as a GP after the accident.
 - NHS BSA should not have discarded Dr Bickerton's opinion that Dr R's major depressive disorder was related to his GP work.
 - NHS BSA are wrong to say that there is a lack of corroborative evidence about any injury while Dr R was working as GP after the accident. They have ignored other witness statements (including that of Dr R's wife), the letters with the Partners and the independent evidence of Dr Bickerton.
 - Under the rules of natural justice NHS BSA should not ignore Dr R's testimony just because he is the applicant.
 - The Scheme medical adviser's instruction to Dr Bickerton on attribution was erroneous and was relevant to his consideration of the "attribution" of Dr R's mental illness.

- NHS BSA should not ignore the contents of Dr Bickerton's letter of 18 November 2014, after correctly establishing that it contradicted his June 2014 report.
- There seems little doubt that Dr R's rescue attempt damaged him mentally and that this developed into a serious and sustained bout of mental illness while he worked as a GP such that it forced him to retire.

Background information, including submissions from the parties

5. Dr R was a Partner in a GP Practice (**the Practice**) that became fundholding in 1992.
6. In August 1993, Dr R wrote a letter to the other Partners asking for their agreement to allow him to job-share with another doctor at the Practice. Among the reasons cited for his request were: his inability to provide appropriate "duty of care", enforced lowering of personal standards, increased tiredness and exaggerated irritation and decreased tolerance with perceived "Heart sink", "Inadequate" and "Time Wasting" patients. His request was rejected.
7. In January 1994, Dr R attended a Post Graduate Education course in France. Between lectures he, five other doctors and a guide, were caught in an avalanche whilst skiing. Dr R was the only survivor – he located the bodies of his colleagues who were all dead. One week after the accident Dr R returned to full duties at the Practice.
8. In December 1994, Dr R attended the Coroner's inquest. The following day he returned to work but shortly afterwards signed off sick.
9. He was prescribed antidepressants by his GP and in February 1995, saw a clinical psychologist (Dr Oxford). The following month he was referred to Dr Rouncefield (Consultant in Psychiatry).
10. Dr R did not return to work. He was awarded ill health retirement and left NHS employment on 31 March 1996.
11. In 2012, Dr R retrospectively applied for a PIB on the grounds that his PTSD and Major Depressive Disorder (**MDD**) were attributable to his NHS employment.
12. The applicable Scheme regulations (as they applied in March 1996) are 'The National Health Service (Injury Benefits) Regulations 1995' (as amended). The relevant Regulation 3 (Persons to whom the regulations apply) states:

 “(1)...these Regulations apply to any person who, while he-

 is in the paid employment of an employing authority;

 ...sustains an injury, or contracts a disease, 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

attributable to his employment and also to any other injury sustained and, similarly, to any other disease contracted, if-

(a) it is attributable to the duties of his employment;

(b) it is sustained while, as a volunteer at an accident or emergency, he is providing health services which his professional training and code of conduct would require him to volunteer; or..."

13. A PIB is payable where the above criteria are met and the person has consequently suffered a permanent (that is to age 65) loss of earning ability (**PLOEA**) of greater than 10 per cent.
14. NHS BSA turned down Dr R's application on the grounds that his mental health condition was not attributable to his NHS employment - NHS BSA concluded that the three circumstances cited by Dr R for his incapacity (namely, the Practice becoming fundholding, the accident and subsequent lack of support from the other Partners) did not satisfy the requirements of Regulation 3(2).
15. Dr R unsuccessfully appealed under stage one of the Scheme's two stage internal dispute resolution (**IDR**) procedure - his appeal included a December 2012 report from Dr Rouncefield.
16. At IDR Stage 2 Dr R was represented by Gordons Partnership LLP who requested that their submission (on behalf of Dr R) be considered as a fresh application rather than a review of the previous decisions. The submission focused on Dr R's role as a rescuer following the avalanche, that his mental health condition was sustained while providing health services as a volunteer and further injury was caused by his day to day work as a GP leading up to the Coroner's Inquest and following his return to work the next day.
17. NHS BSA treated the submission as an IDR stage two appeal and asked OH Assist to consider whether Dr R's role as a volunteer in a rescue situation met Regulation 3(2)(b) and if so whether he had suffered any PLOEA.
18. A doctor for OH Assist concluded that Dr R's role as a volunteer rescuer did satisfy Regulation 3(2)(b) and recommended commissioning a specialist examination and report (Dr Bickerton's June 2014 report).
19. After Dr Bickerton's report was obtained NHS BSA turned down Dr R's final appeal. The Disputes Manager concluded that the cause of Dr R's mental ill health was multi factorial with perceived contributing factors from:
 - his early life,
 - perceived stress from the Practice's development in the early to mid-90's and fundholding,
 - the avalanche and his unsuccessful attempt to rescue his colleagues,

- the perceived lack of support from his colleagues/partners at the Practice on his return to work after the skiing accident; and
- the perceived stress from re-living the events at the Coroner's inquest and meeting and talking to the distressed relatives of the deceased.

20. The Disputes Manager went onto to say:

- Events in Dr R's early personal life clearly had no causative connection to his NHS work.
- Whilst the veracity of Dr R's claim was not in question there was only his personal statement as to how he felt about how General Practice was developing with fundholding in particular. There was nothing in the medical evidence to suggest that he was suffering any kind of mental health condition as a result of the situation prior to the accident.
- Similarly there was no medical evidence to support Dr R's contention that the lack of support from his colleagues/ Partners at the Practice following the accident caused him to suffer mental ill health. His personal statement was insufficient on its own.
- Consequently, in the absence of a specific recorded incident or series of incidents the only option was to regard both claims as an "injury by process", which the Scheme did not cater for.
- It was accepted that Dr R had suffered a minor PTSD attributable to his NHS employment as a result of his 'volunteer' activities immediately following the avalanche. However that injury on its own had not caused Dr R a PLOEA in excess of 10 per cent because his current incapacity was caused by the MDD that had developed (over a period of time) afterwards related to his GP work, rather than anything connected to the original accident. "In other words there was no contribution by the earlier stress caused by the accident".

21. Subsequently Dr R obtained further comment from Dr Bickerton, but NHS BSA decided not to amend their decision on the grounds that Dr Bickerton's comments contradicted his previous report and were supplied following incorrect information relating to the Scheme from Dr R and specific questions posed by him.

22. A summary of the medical evidence is provided in the Appendix.

Adjudicator's Opinion

23. Dr R's complaint was considered by one of our Adjudicators who concluded that further action was required by NHS BSA. The Adjudicator's findings are summarised briefly below:

- At IDR stage one, NHS BSA had failed to say why they preferred the opinion of the OH Assist doctor over that of Dr Rouncefield, a specialist in Dr R's condition, on the question of causation of Dr R's condition. Recrudescence of past trauma in

Dr R's youth had not been considered attributable by Dr Rouncefield, or later by Dr Bickerton, another specialist in Dr R's condition.

- The OH Assist doctor had commented that Dr R had not provided any evidence that he formally objected to fundholding. But Dr R did not have to object to fundholding to show that he found it impacted on his work and caused him stress.
- NHS BSA's comment on the retrospective nature of Dr Rouncefield's reports equally applied to the report they had received from the OH Assist doctor.
- At IDR stage two, while OH Assist's instruction to Dr Bickerton had incorrectly quoted the attribution test ("wholly and mainly attributable to NHS employment", rather than "attributable to") the error had made no material difference to NHS BSA's consideration as they had accepted the attributable injury (minor PTSD), which Dr Bickerton's letter noted.
- However, NHS BSA had incorrectly directed OH Assist to limit their consideration to the extent to which Dr R's PTSD caused him a PLOEA. NHS BSA failed to assess the extent, if any, of Dr R's MDD was attributable to his NHS employment - an error which stemmed back to the original decision.
- The Disputes Manager had said that there was a lack of corroborative evidence, supporting Dr R's personal statements, and that the Scheme did not extend to covering this type of claim where the applicant had been injured over a period of time by a process. On the first point, it was not clear that NHS BSA had given consideration to the statements of Dr R's wife, and a Practice Nurse, or Dr R's job sharing request letter to the Partners of 23 August 1993, the latter indicative of things not being well before the accident. Dr R had said in a letter of 13 March 1995, to a Partner at the Practice, that in his opinion his difficulties had probably started as "a combination of the "new" contract, giving up the "day off" previously taken, change of timetable, and the implications and moral dilemmas presented by fundholding". On the second point, this was something that the Ombudsman had dealt with previously (Gibbs 81977/1 and Taylor PO-751). While a single or multiple "incidents" may precipitate an injury, an injury may equally be sustained over a period of time as a result of the cumulative effect of the person's employment. Rather than considering "incidents" alone, it was necessary to consider the cumulative effect of the nature of Dr R's duties. NHS BSA needed to satisfy themselves that Dr R's MDD was not itself a result of his employment as a GP.
- NHS BSA had failed to ask Dr Bickerton if his opinion had changed since his report 'in light' of his subsequent letter to Dr R of 18 November 2014.
- The whole matter had caused Dr R significant distress and inconvenience which merited a payment of £500.

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24. NHS BSA accepted the Adjudicator's Opinion. Gordons Partnership (on behalf of Dr R) did not and the complaint was passed to me to consider. Gordons Partnership provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and therefore, I will only respond to the key points made by Gordons Partnership for completeness

Ombudsman's decision

25. Gordons Partnership say there is sufficient evidence for the Ombudsman to substitute NHS BSA's decision with a finding that Dr R is entitled to a PIB. They say Dr R's mental health is deteriorating, he cannot face a drawn out process, he has not been in gainful employment for decades and he is impecunious.
26. I do not consider the circumstances of this case merit my making such a direction as there is no indication that NHS BSA wilfully intended not to give proper consideration to Dr R's application, or that they would do so now. I have no doubt that NHS BSA will take into account Dr R's poor health in the conduct of their review.
27. Gordons Partnership say if this matter is remitted back to NHS BSA their reconsideration should be based on current medical evidence.
28. I do not agree. NHS BSA's reconsideration should be based on the medical evidence available around the time Dr R applied for ill health retirement and subsequent medical opinion commenting on that medical evidence.
29. Therefore, I uphold Dr R's complaint on the same basis as the Adjudicator's Opinion.

Directions

30. NHS BSA shall:
- within 14 days of the date of this Determination pay Dr R £500 for the significant distress and inconvenience caused; and
 - within 28 days of the date of this Determination consider wholly afresh whether Dr R satisfies the criteria for a PIB. As part of their consideration NHS BSA should address the points raised in the Adjudicator's Opinion (as summarised above in paragraph 23).

Anthony Arter

Pensions Ombudsman
18 August 2016

Appendix

Dr Rouncefield's comments (dated 28 January 1996) on Dr R's ill health application

31. Under 'Diagnosis' Dr Rouncefield noted MDD and PTSD and said increasing stress in the lead up to becoming fundholding had led to symptoms of depression so that by the time Dr R experienced the severe trauma of being the only survivor of the avalanche he already fulfilled the criteria for a MDD.

Under 'Past History' Dr Rouncefield said that from 1993 to 1994 Dr R had experienced increased stress at work and that following his return to work after the accident had struggled on at work. She said from January 1995 Dr R was no longer able to function and was advised by his GP to stop work. He had been treated with antidepressants and had received psychotherapy from a clinical psychologist, but with no improvement, and had been referred to her.

Dr Rouncefield's 10 December 2012 report.

32. Among other things Dr Rouncefield said:

- Dr R had remained under her care since the end of March 1995.
- Dr R had developed a MDD (prior to the skiing accident) as a consequence of the stress he was subjected to after the Practice became fundholding. He found it extremely stressful not being able to maintain the standards to which he aspired and it was quite possible that even without the trauma of the accident he may still have found himself in the same position.
- She was very aware of the atmosphere at the Practice in which Dr R was trying to work and of the attitude towards staff sickness. Prior to Dr R's retirement she had been treating another doctor and a staff member at the same practice who had described experiencing similar treatment to Dr R.
- Dr R had taken early retirement not because of the skiing accident (he had worked for a year following it), but as a consequence of the Practice's unwillingness to allow him either a graduated return to work or to job-share with a partner to facilitate a return to work. In a depressed state of mind he concluded that the Practice did not value him and his self-esteem and confidence became very seriously impaired.

OH Assist's report at IDR stage 1

33. A doctor for the Scheme's Medical Adviser (OH Assist) concluded that Dr R's condition was due to the effects of the accident (which was not attributable to his NHS employment) and non-work related past trauma (from Dr R's youth). Among other things the doctor said:

- Dr R had a past history of Unipolar Depressive Disorder and a family history of significant mental illness.

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- There were no contemporaneous reports of perceived stressors in Dr R's GP role prior to the avalanche.
- Dr Rouncefield's reports were all retrospective because she first saw the applicant when he was seriously unwell, 14 months after the avalanche and three years after the Practice became fundholding.
- Dr Rouncefield's contemporaneous reports referred to post traumatic stress symptoms and recrudescence of morbid ruminations relating to past traumas making Dr R incapable of General Practice. Her more recent assertions that fundholding had caused Dr R's condition were not borne out by her previous reports or supported by other evidence.
- Dr R had not provided any evidence that he had formally objected to fundholding or had not signed the fundholding contract.
- Dr R's perceptions to Dr Rouncefield about work (pre and post the avalanche) were extremely likely to have been coloured by his severely compromised mental state.
- The evidence showed that rather than finding General Practice stressful Dr R had ceased coping with the normal demands of his work because of his mental health symptoms.
- There was no direct evidence that his Partners had failed to support Dr R's return to work.

OH Assist's report at IDR stage two

34. A doctor for OH Assist concluded that in checking to see if the rest of the party were alive and could be resuscitated Dr R satisfied Regulation 3(2)(b).

Dr Bickerton's 18 June 2014 report

35. Among other things Dr Bickerton said:

- Dr R had a stoical attitude and had tolerated significant adversity.
- He had clearly described his level of work prior to the index event as being typical of general practice at the time and manageable. He had denied any mental disorder at that time.
- The avalanche itself was highly traumatic but he appeared to have managed the emotional effects relatively well. If he had been less mentally well he would likely have been off work immediately after the accident.
- It was the period following the avalanche which appeared to have created the increasing difficulty for Dr R. Dr R was emotionally stressed on his return to work and the perceived lack of support and understanding from his practice must have been a burden for him, but the pinnacle of trauma for him seemed to have been the Coroner's inquest and subsequent clinical and administrative work.
- Dr R became emotionally, physically and occupationally exhausted with very few avenues for support (Dr R tried to reduce his workload by requesting part time work or a job share, which his partners would not entertain) leading to a

significant depressive disorder. This led to his period of time off work and eventual retirement on grounds of ill health.

- Retirement added to rather than relieved Dr R's depression (Dr R's career was a major protective factor and a major component of his identity).
- It was the MDD that contributed to all of Dr R's current incapacity.
- Dr R was currently unfit to work as a doctor in the NHS.

36. Commenting on the connection between Dr R's current incapacity with the skiing accident Dr Bickerton said the skiing accident was best viewed as a precipitating event which probably led to a surprisingly minor PTSD, which was not managed well. The perpetuating factors were Dr R's experiences in a very unsupportive practice environment and aggravated by the Coroner's inquest and subsequent clinical and administrative work, which in turn led to a MDD.
37. OH Assist asked Dr Bickerton to apportion causation (for Dr R's current mental health condition) between the trauma of the skiing accident and the experiences in the unsupportive Practice. Dr Bickerton said he considered the events to be part of a causative sequence rather than individually responsible for Dr R's ongoing difficulties and gave his opinion that the skiing accident was responsible for 5-10 per cent of Dr R's current suffering and his working environment between 90-95 per cent.

Dr Bickerton's 18 November 2014 letter to Dr R

38. Dr Bickerton said the accident was the primary precipitating event and without it the likelihood was that Dr R would still be working. He said he estimated that at least 90 per cent of Dr R's difficulties were directly attributable to the accident and related Coroner's Court appearance.