PO-10414

Ombudsman's Determination

Applicant	Mrs D
Scheme	NHS Injury Benefit Scheme (**the Scheme**)
Respondent	NHS Business Services Authority (**NHS BSA**)

Outcome

1. Mrs D's complaint is upheld and to put matters right NHS BSA will reconsider Mrs D's eligibility for Permanent Injury Benefit (**PIB**) and pay her £500 to recognise the significant distress and inconvenience it has caused her.

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

Complaint summary

1. Mrs D's complaint is that NHS BSA has refused her application for PIB.

Background information, including submissions from the parties

2. The relevant regulations are The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended) (**the Regulations**)

   Regulation 3 provides:

   "(1) … these Regulations apply to any person who, while he -

   (a) is in the paid employment of an employing authority …

   … 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. Regulation 4 sets out the scale of benefits which may be paid and provides:

> "(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 …"

4. From 2005, Mrs D was employed by Devon Partnership NHS Trust (**the Employer**) as a Clinical Team Leader in the mental health field, specifically counselling victims of sexual abuse.

5. In January 2011, Mrs D suffered a head injury at home.

6. On 10 May 2011, a Clinical Psychiatrist assessed Mrs D. He explained that Mrs D was 'exhibiting a catastrophic reaction to a minor head injury and I believe a severe dissociative state'. Mrs D was on long term sick leave for around one year due to this. Mrs D remains under the care of the Clinical Psychiatrist.

7. On 17 February 2012 an Occupational Health (**OH**) physician assessed Mrs D and wrote:

> "Based on [Mrs D's] current functioning, it is my opinion that it would be appropriate to attempt a trial of work for [Mrs D]. Work in itself may provide a form of therapeutic outlet for her and should be encouraged. [Mrs D] has made good progress outside of the workplace and the idea will be for her to transfer these skills back into a working environment.
>
> Based on my discussion with her today, I would suggest the following: -
>
> - [Mrs D] returns to work starting from the 1st March 2012.
> - I would suggest on her return to work she is excluded from any clinical duties for the first three months. A return to clinical duties after the three month period should be made only after you are satisfied with her decision making skills and [Mrs D] herself is confident to engage in this aspect of her duties.
> - I would suggest you have once weekly meetings with [Mrs D] to capture her difficulties and for you also to be able to give her some relevant feedback about her progress so far. I would suggest you consider this for the phased return period.
> - I would suggest a phased return as below…"

8. Mrs D has said that her return to work began successfully, however she was, on short notice, reassigned to several new and 'difficult' teams in different locations, requiring her to travel for an additional 200 miles per week.

9. On 16 November 2012, Mrs D met with OH. The OH physician wrote:

> "[Mrs D] tells me she started feeling unwell again following prolongation of her recent reassignment to Honiton beyond the agreed four weeks. She states as a result of this journey she was working almost 50 hours per week and driving almost an extra 200 miles per week.
>
> [Mrs D] tells me her schedule began to impact on her sleep and her motivation levels were dropping. She tells me she was experiencing symptoms similar to when she had been off sick on long term recently."

10. In the same report, the OH physician confirmed that Mrs D was fit for work but that Mrs D's health issues were exacerbated by the changes to her work, and that 'any further stress that were to overwhelm her resilience would likely lead to further absences'.

11. On 3 January 2013, Mrs D again met with OH. The OH physician letter to the employer is quoted in Appendix 2.

12. On 7 March 2013, Mrs D's Consultant Neuropsychiatrist assessed her and wrote a report. Extracts form this are as follows:

> "Nonetheless, it was impressive that she managed to get 'the fight back in her belly' to try to return to work in April 2012 and she did this quite appropriately alongside Occupational Health and within a carefully staged return to work. I suspect she was still symptomatic. This was managed over six months supported by a temporary manager working alongside her. Hours were to be strictly restricted to $37^{1/2}$ hours and she was to be based in Exmouth which is, of course, only a few miles from where she lives in [Mrs D's town]. I understand from her things were going well, she had a good relationship with the Team in Exmouth.
>
> Unfortunately, five months into her return to work her managers, without consultation, switched her to work in Honiton to manage a Team that she had not managed before. Whilst the placement was only meant for three weeks, she ended up by being left there for some months. Working in Honiton added many hours to her week because of the commuting, and she had to establish herself in a new Team. She was working 50 hours per week. If this indeed was the case, such a move was unwise. Predictably, she started to become unwell and she described to me a sense of internal shaking as if she had inside her 'one of those Rolf Harris wobble boards'. She was put on Sertraline but given the stress she was under it is not surprising this failed to work."
>
> …
>
> "My overriding view of [Mrs D] today was that as a result of a failure of her employers to understand her vulnerable psychological state on return to work and follow the advice from Occupational Health; she has developed a depressive disorder which is, at least, moderately severe bordering on severe.

> She described this as a sense of being bullied by them. I clearly only have her side.
>
> She seems to have been traumatised by what has happened to her and most notably lost trust in her faith and ability to trust other people and her workplace. This may have implications on future return to work."

13. In October 2013, Mrs D left employment. On 11 December 2013, Mrs D applied for PIB on the basis of an extreme dissociative state and depression caused by work related stress.

14. On 25 February 2014, NHS BSA sent its initial decision letter, rejecting Mrs D's application. NHS BSA quoted the Scheme medical adviser (**SMA**):

> "The applicant was off sick from March 2011 – March 2012. Dr Webb has carefully analysed the causes of this in the light of the medical records made available, and concludes that this absence was due to a complex interplay of post-concussional syndrome due to an accident at home in January 2011, and work related stress. He gives the view the(sic) without this injury the work related stress would not have led to her depression."

15. Mrs D appealed this decision. On 27 January 2015, NHS BSA issued its decision at stage one of the internal dispute resolution procedure (**IDRP**). The SMA said:

> "Dr Briscoe's [an independent consultant psychiatrist] concluding advice is that had it not been for the head injury she would not have become ill in 2011 and 2012, and had she not become ill then on balance a move to a more challenging team in Honiton would not have led to such a serious and permanent deterioration in her health.
>
> I have to conclude that, having weighed all of the evidence carefully, my advice to NHS Pensions is that attribution should not be accepted in this case. The key event that led to the unravelling of Mrs D's mental ill health was a non work related event and any subsequent aggravating factors would not have led to the events that unfolded. Those events were not wholly or mainly the cause of her long term health.

16. On 27 July 2015, NHS BSA issued its stage two IDRP decision. This said:

> "In reaching this recommendation the medical adviser is saying that the main cause for [Mrs D's] condition and incapacity to work is the non work related head injury which occurred in January 2011. In reaching this recommendation the medical adviser acknowledges that [Mrs D] had experienced instances of perceived work stress, however considered that it was the non work related head injury which has triggered [Mrs D's] claimed condition."

Adjudicator's Opinion

17. Mrs D's complaint was considered by one of our Adjudicators who concluded that NHS BSA should review the decision afresh. The Adjudicator's findings are summarised briefly below:-

    - In the case of NHS Business Service Authorities v Young[1], it was Mrs Young's injury to her neck and lower back, sustained whilst attending a patient that was relevant to the decision, not the 'degenerative condition of the spine'
    - Whilst Mrs D had suffered a head injury outside the workplace, it had been confirmed that she was recovering and had returned to work successfully under medical supervision.
    - The work related stress caused by the mishandling of this return to work is itself an injury for the purposes of regulation 3.
    - NHS BSA should review its decision, asking itself if this injury (the work related stress) was wholly or mainly attributable to the employment.
    - NHS BSA should pay £500 directly to Mrs D to recognise the significant distress and inconvenience its mishandling of the PIB decision has caused her.

18. NHS BSA did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHS BSA provided its further comments, which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by NHS BSA for completeness.

Summary of NHS BSA's further comments

19. At stage one of the IDRP, the SMA commissioned an independent medical report from Mr Briscoe. He concluded that Mrs D would not have developed the dissociative illness if the head injury had not occurred.

20. At stage two of the IDRP the SMA recognised that Mrs D perceived work stress within her role, but that it was the non work related head injury that was "the main contributory cause of the dissociative illness for which [Mrs D] has claimed PIB".

21. Mrs D's entitlement to PIB has been declined on the grounds that the requirements of regulation 3(2) have not been met.

22. The *Young* case did not turn on the interpretation of regulation 3.

Ombudsman's decision

23. NHS BSA asserts that the *Young* judgment (summarised in Appendix 1) does not assist because it was concerned with regulation 4(1); it having been accepted that

[1] *NHS Business Services Authority v Young* [2017] EWCA Civ 8

Mrs Young met the requirements of regulation 3(2). Whilst I acknowledge that the Courts were primarily focused on the interpretation of regulation 4(1), I do not agree that the judgment cannot then assist in interpreting same terms used in regulation 3(2). Not least because one would expect there to be some consistency of interpretation throughout the regulations.

24. Regulation 3(2) provides for the regulations to apply to an individual who has sustained an injury, or contracted a disease, which is wholly or mainly attributable to their NHS employment or the duties of that employment. Mrs D has applied for PIB on the basis that changes to her employment caused work related stress resulting in a dissociative illness.

25. Regulations 3(2) and 4(1) call for a two-stage process. The first stage is for NHS BSA to determine whether Mrs D has sustained an injury which is wholly or mainly attributable to her NHS employment. The second stage is for it to determine the effect of the injury.

26. NHS BSA's decision on Mrs D's PIB application is focused on the SMA's opinion that '[Mrs D] would not have developed a dissociative illness if the head injury had not happened'. It does not seem that the SMA had the correct question in mind when carrying out its assessment. The correct question the SMA needed to ask itself was 'whether Mrs D sustained an injury or contracted a disease in the course of her NHS employment and for which the NHS employment is the whole or main cause, i.e. at least 50% the cause of the injury'.

27. As J Nugee said in Young, in the absence of a specific definition, the natural meaning of 'injury' includes a physiological or psychological change for the worse.

28. Looking at the NHS BSA's reasoning in its decision making it does not say how it has reached the conclusion that Mrs D's injury was not wholly or mainly attributable to her employment. That is the question that it needs to ask itself. Instead it simply relies on what the SMA has said, despite the fact that the question the SMA appears to be answering is not the correct one. The SMA's focus appears to be on whether the later illness (depressive disorder) would have happened at all without the head injury, not whether Mrs D has sustained an injury in the course of her NHS employment, which is wholly or mainly attributable to the duties of her NHS employment.

29. From the evidence provided it appears that there are several factors which need to be taken into account in answering the above question and not just Mrs D's earlier head injury. Ultimately there does not appear to be a dispute that Mrs D has a depressive illness which has been impacted by her head injury, that either worsened an existing depression, caused it or contributed to it. The SMA only focused on whether Mrs D would have the depressive illness without the head injury, which is only relevant in so far as determining what came first rather than to what extent the work related stress injury was a result of work related activity.

30. NHS BSA needs to determine whether Mrs D experienced an injury, which includes a psychological change for the worse, in 2012 which was, at least, mainly caused by the changes made to her employment.

31. Therefore, I uphold Mrs D's complaint.

Directions

32. Within 28 days of the date of this determination, NHS BSA:

(i) Will reconsider Mrs D's eligibility for PIB. It will ask itself the question, 'did Mrs D sustain an injury (work related stress leading to symptoms of a depressive disorder) which was wholly or mainly attributable to her NHS employment or the duties of her employment?'

(ii) If the answer to the above question is that Mrs D did sustain a qualifying injury, NHS BSA will consider whether, as a result, her earning ability is permanently reduced by more than 10%.

(iii) Will pay £500 directly to Mrs D to recognise the significant distress and inconvenience caused by the administration error identified in making its original decision.

Karen Johnston

Deputy Pensions Ombudsman
31 July 2018

Appendix 1

NHS Business Services Authority v Young

33. Mrs Young had appealed a decision by the then Deputy Ombudsman (**DPO**), dated 28 November 2014, not to uphold her complaint that she should be awarded a PIB.

34. NHS BSA had accepted that regulation 3 was satisfied; in that Mrs Young had sustained an injury which was wholly or mainly attributable to her NHS employment. It did not accept that regulation 4 was satisfied. NHS BSA decided that the attributable incident would only have caused a temporary injury in an individual of Mrs Young's age who did not have a pre-existing degenerative back condition. It said it was Mrs Young's pre-existing back condition which was the cause of her PLOEA and this was not wholly or mainly attributable to her NHS employment.

35. The grounds of appeal were as follows:-

    - The DPO had misapplied regulations 3 and 4 of the NHS (Injury Benefits) Regulations 1995 in upholding NHS BSA's reconsidered decision because the advice from its medical adviser asked and answered the wrong question in law as to causation of Mrs Young's 100% PLOEA;

    - The DPO had failed to consider whether the index injury accelerated or exacerbated Mrs Young's underlying condition so as to contribute to her current 100% PLOEA by at least 10%;

    - It was perverse for the DPO to accept that the index injury made a 0% contribution to Mrs Young's 100% PLOEA.

36. Nugee J accepted Mrs Young's argument that the reference "by reason of the injury" found in regulation 4 should be given its ordinary meaning. He found there was nothing in the drafting of that specific regulation that precluded the notion that injury/disease could come from a combination of causes (such as a pre-existing injury) as opposed to a single, sole, determinant. It was sufficient for the attributable injury to be an operative cause.

37. Nugee J acknowledged that this interpretation could give rise to an anomaly; that is, an injury which was wholly or mainly due to employment but was only a contributory cause of PLOEA could nevertheless trigger the entirety of the benefit. He did not consider this sufficient reason to displace what he regarded as the normal use of the language. He then referred to the "eggshell skull" concept. He accepted that this was a rule applicable to the liability of tortfeasors but did not consider that meant it was inapplicable in Mrs Young's situation.

38. Nugee J agreed with Mrs Young's principle point of appeal that, in the context of the facts of her PIB complaint, the DPO had directed NHS BSA to ask its medical examiner the wrong question. He said:

> "… the question that should have been asked was not what impact the injury would have had on a woman of Mrs Young's age who did not suffer from degeneration of the spine, but what impact it had on Mrs Young, given her pre-existing condition."

39. NHS BSA subsequently appealed this decision. The appeal was dismissed.

40. The Court of Appeal held that, once it was accepted that the injury sustained by Mrs Young was wholly or mainly attributable to her NHS employment, Nugee J's construction of regulation 4 must be correct. Flaux LJ said:

> "The words 'by reason of' import a 'but for' test of causation: was the injury an operative or effective cause of the PLOEA. What they do not import is the construction for which the Authority contends, that the injury must be the effective or the operative cause. Such a construction seems to me to necessarily involve reading across the words 'wholly or mainly' from regulation 3(2) so that the provision reads: 'whose earning ability is permanently reduced by more than 10 per cent wholly or mainly by reason of the injury'. This rewriting of the regulation is wholly impermissible. The fact that the words: 'wholly or mainly' were added to regulation 3(2) by amendment in 1998 but those words were not also inserted in regulation 4 before: 'by reason of' prohibits any construction which involves reading those words into regulation 4."

41. Flaux LJ said it was important to bear in mind that Nugee J was not prejudging whether Mrs Young was entitled to a PIB; he was merely stating that her entitlement had not been properly assessed because the correct statutory question had not yet been asked. He acknowledged that it might emerge that, even if the injury had caused increased deterioration of Mrs Young's degenerative condition, it may always have deteriorated to the extent that she would not have been able to work.

42. Flaux LJ did not accept that Nugee J had applied a 'material contribution' test or that the eggshell skull principle formed part of his reasoning as to the correct construction of regulation 4. He said he read the reference to the eggshell skull principle as "no more than that the fact that the correct construction of the regulation may lead to a result which is the same as in eggshell skull cases is no reason for not adopting that construction". He considered this "plainly right" and said if the regulation had been drafted in such a way as to have that consequence, the solution was for there to be a legislative change; not for the courts to read words into the regulation which were not there.

Appendix 2

Occupational Health report - January 2013

It is my understanding that [Mrs D] is currently away from work following a recent offer of a job which was not her stated preference.

[Mrs D] tells me she was not happy with her new job offer due to the travelling distances involved in this job.

She tells me this job will involve traveling between Exmouth, Honiton, Tiverton and Crediton. She tells me based on her most recent experience it would involve her making in excess of 200 miles per week in addition to her usual commuting distance.

Following my recent meeting with her in November 2012, she had expressed similar concerns following being temporarily reassigned to a post that involved similar levels of travelling.

[Mrs D] tells me, as a result of these developments, her mood has relapsed significantly. She reports poor concentration, poor sleep, a feeling of hopelessness and tells me, prior to her appointment today, had not left home for the past two weeks.

[Mrs D] also believes there has been a breach of trust regarding how some of her recent concerns have been handled. This is based on her perception of events.

Noting her current mood today and her current mental health, I remain concerned that she may most likely relapse into a long term sickness absence as observed within the past two years. She has started on medication from her General Practitioner and has also restarted psychological therapy. Support from you as her manager in her ability to continue to access these therapies will be most beneficial to her.

Following discussion with her today, [Mrs D] has identified [Mr B] as an individual who she would want to mediate in the process between her and management over her concerns.

Fitness for Work

In response to the specific questions in your letter:-

1) *Is this person fit for her current employment?*

   Based on my understanding of her current mental health, it is my opinion that she is currently temporarily unfit for work.

2) *If not, please indicate how long she will remain unfit?*

   It will be difficult to be certain as to how long she will remain unfit.

3) *Is she permanently unfit for this post?*

   No.

4) *If the employee is currently unable to carry out their contracted duties, is a return to work in a modified role possible and if so, for how long will modifications be required?*

   Following her recent appointment, she expressed concern regarding the commuting aspects involved in her day to day duties. Noting that [Mrs D] has recently come off a long period with mental health issues, options around jobs strain and low pressure will reduce the risk of relapse.

5) *Is the current health problem work related or made worse by their current role?*

   In my opinion her current health problem is work related. [Mrs D] states there are no current non-work related issues that are impacting on her current mental health.

6) *Are there any steps we, as her employer, can take to aid recovery/return to work in order to minimise further sickness absence and necessary recommendations for redeployment?*

   I would suggest in the first instance you consider a mediation process to consider her concerns.

7) *On the basis of this employee's medical condition, can you predict further sickness absence patterns?*

   This individual has most recently been away on long term sickness absences related to mental health. With further perception work related stress, the likelihood of short to medium term sickness absence will occur.

10) *When should she be referred back to you?*

    I will arrange to review her again in six weeks' time.