

## Ombudsman's Determination

Applicant	Mrs U
Scheme	NHS Injury Benefit Scheme ( <b>the Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHS BSA</b> )

## Outcome

1. Mrs U's complaint against NHS BSA is partly upheld, but there is a part of the complaint I do not agree with. To put matters right for the part that is upheld, NHS BSA should pay Mrs U £500 for distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs U has complained that NHS BSA, the scheme manager, has awarded her Band 3 Permanent Injury Benefits (**PIB**). She believes it should award her Band 5 PIB, as it originally did before reversing its decision.

## Background information, including submissions from the parties

4. Originally, Mrs U was employed by the NHS as a specialist biomedical scientist, and was a member of the Scheme. The rules that govern the payment of PIB are outlined in Section 4(1) of the NHS Injury Benefit Scheme Regulations 1995 [as amended] (**the Regulations**). These state as follows: -

“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 and who makes a claim in accordance with regulation 18A.”
5. In September 2012, Mrs U injured her shoulder at work, when she was 64.
6. In May 2013, Mrs U had surgery on her shoulder, when she was 65.
7. In June 2014, Mrs U left the NHS, after a period of sick leave due to “musculoskeletal problems” and annual leave, when she was age 66.
8. In July 2014, Mrs U applied for PIB.

9. In October 2014, a report was produced by a Dr W. It stated: -

“It is more than a year following surgery and in my opinion, it is very unlikely that Mrs [U’s] symptoms will change appreciably in the future and her current level of symptoms can be regarded as a stable state.

I think that it is likely that [Mrs U’s] symptoms would be unlikely to restrict her activities at waist level or working at or below desk height. Her symptoms may well be aggravated by repeated activity at shoulder height or above shoulder height.

These symptoms, which are subjective, may preclude her working in a laboratory depending on the amount of work that she would need to do at shoulder height and above.”

10. In August 2014, NHS BSA wrote to Mrs U awarding Band 5 PIB. It stated: -

“It is my opinion on the balance of probabilities the evidence in this case confirms that the incapacitating effects of the accepted condition were permanent in that they lasted up to the 65<sup>th</sup> birthday and for a year beyond.

Having regard only to the limiting effects of the above accepted attributable condition and the applicant’s aptitude, educational level and experience, it is assessed that on the balance of probabilities, the applicant was incapable of any work (because of her relevant injury and its treatment) on her 65<sup>th</sup> birthday and until her 66<sup>th</sup> birthday.”

11. In November 2014, NHS BSA wrote to Mrs U again. It stated: -

- In order to be awarded PIB, it must be shown a permanent loss of earning ability (**PLOEA**) of more than 10% has been suffered, and that that loss is, “wholly or mainly” attributable to NHS employment.
- If a member leaves employment before 65, her PLOEA is based on capability to 65; where the member has already reached 65, it is based on capability, “for some time to come”, namely 6-12 months after termination of employment.
- The original decision, to award Band 5 PIB, incorrectly used the first test rather than the second test, therefore the first test must be set aside.

12. Mrs U appealed NHS BSA’s decision to overturn the original award.

13. In May 2015, NHS BSA responded under stage 1 of its internal dispute resolution procedure (**IDRP**). It stated: -

- It was satisfied that Mrs U was suffering from a condition that was wholly or mainly attributable to her NHS employment.
- Having re-assessed her case, however, it was now awarding her Band 3 benefits, which corresponded to a PLOEA of between 26-50%.

- The reason Band 3 was being awarded was that Mrs U had ceased working for the NHS after age 65. Therefore, the test in connection with any PLOEA due to the attributable condition was based on her capability for work “for some time to come”. In her case, that meant 6 to 12 months after she stopped working for the NHS, or until 10 April 2015.
- It considered reasonable progress had been made following surgery in May 2013. The pain was at a different site from where it was experienced before surgery. According to medical reports, the symptoms would be unlikely to restrict Mrs U’s ability to work at waist height, although her ability to do manual work at or above shoulder height was restricted.
- The continuing symptoms were not attributable to the incident, and they arose a considerable period of time after surgery. Therefore, no PLOEA was advised in relation to these non-attributable factors.
- It took advice from professionally qualified, experienced and specially trained Occupational Health doctors. The medical advisers recommended payment of PIB and NHS BSA accepted that.

14. Mrs U appealed again.

15. In November 2015, a Dr K wrote to NHS BSA about Mrs U’s condition. He stated: -

“Unfortunately, with the limited improvement [Mrs U] has reported, it seems that at least in the short term, her shoulder will continue to cause her problems with pain and limited mobility.

While it is not possible to accurately describe her ability to undertake day-to-day activities, [Mrs U’s] pain and limited movements would have a detrimental impact on day to day life.”

16. In February 2016, NHS BSA responded under stage 2 of its IDRP. It reiterated the points it had made in its stage 1 response. It also added: -

“The medical adviser has explained that the Band 3 PLOEA assessment due to the accepted right shoulder injury remains appropriate. The medical adviser considers that within twelve months following [Mrs U’s] termination of employment on 10 April 2014, [she] would be capable of undertaking a full time Administrative Officer role. Such a role would not involve significant lifting.

I can see nothing in the medical adviser’s analysis or the evidence upon which it is based that would cause me to disagree with his findings. Nor do I consider that his conclusion is perverse; that is, one which no reasonable body of people could have reached based on the same evidence.”

17. Dissatisfied with NHS BSA’s response, Mrs U referred her complaint to this Office.

## **Adjudicator's Opinion**

18. Mrs U's complaint was considered by one of our Adjudicators who concluded further action was required by NHS BSA. The Adjudicator's findings are summarised briefly below:-

- Initially, NHS BSA concluded that Mrs U had suffered a PLOEA as it lasted until her 65<sup>th</sup> birthday and a year beyond. As she was incapable of working in that period, it was considered that she had suffered a PLOEA of more than 75%, so she was awarded the maximum PIB at Band 5.
- However, as Mrs U had already reached 65, the correct period was not to her 65<sup>th</sup> birthday and a year beyond, but within 12 months from when she left the NHS, namely from June 2014. Department for Health guidance stated, where the member is above normal pension age when claiming PIB, it is standard practice to assess "permanent" as being over 6-12 months.
- After considering the medical evidence, NHS BSA considered that within the 12 month period from June 2014, Mrs U would be capable of undertaking a full time Administrative Officer role.
- This was a rational decision as it was based on professional medical advice, as outlined in the October 2014 and November 2015 reports. The first report stated Mrs U's symptoms would be unlikely to restrict her activities at waist level or desk height. The symptoms might prevent her working in a laboratory; however, that depended on the type of work being carried out. The role being proposed was an Administrative Officer, with no heavy lifting or work above shoulder height.
- The second report stated that Mrs U continued to experience pain and limited mobility. However, it was not possible to accurately describe her ability to carry out day to day activities. With no clear warning that Mrs U's condition had significantly deteriorated since October 2014, the medical adviser could not conclude that Mrs U would be unable to carry out an administrative role.
- Therefore, the revised decision to award Mrs U PIB at Band 3 was correct. However, Mrs U would have experienced significant distress on learning that her benefits had been reduced. Therefore, the complaint should be upheld in part, and NHS BSA should pay Mrs U £500 for the distress and inconvenience this matter had caused her.

## **Ombudsman's decision**

19. NHS BSA accepted the Adjudicator's Opinion, but Mrs U did not, so the complaint was passed to me to consider. Mrs U has provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs U for completeness.

20. It is regrettable that it has taken some time to assess Mrs U's complaint, however, we have now examined the evidence and I agree with the Adjudicator that NHS BSA has acted correctly in this case. This is because, as the Adjudicator explained, NHS BSA used the wrong test when it awarded Mrs U Band 5 PIB, because it failed to take into account her age. In its later decision, to award Band 3 PIB, NHS BSA used the correct criteria.
21. The Administrative Officer role is only relevant because, when it decides whether to award PIB, and at what level, NHS BSA must calculate the member's permanent loss of earning ability. To do that it compares, firstly, what the member earned before the injury, with, secondly, what she could potentially earn, in a role deemed appropriate for her capabilities, after the injury. So the question is not whether NHS BSA actually offered Mrs U the role. Rather, the question is whether the medical experts believed she would be capable of carrying out such a role. In Mrs U's case, the expert opinion was that she could.
22. In deciding whether, and at what level, to award PIB, NHS BSA had to consider the medical evidence that was available in respect of Mrs U's circumstances at the time of her claim. It could not consider any subsequent medical evidence such as, for example, later physiotherapy sessions, which she mentioned in her letter of 30 May 2017.
23. Therefore, I agree that the later decision to award Band 3 PIB was correct. However, I also agree that NHS BSA's error would have caused Mrs Y significant distress and inconvenience, for which an award of £500 is justified.
24. Therefore, I uphold Mrs U's complaint in part.

## **Directions**

25. Within 21 days of the date of this Determination NHS BSA will pay Mrs U £500 for the distress and inconvenience its error has caused her.

**Anthony Arter**

Pensions Ombudsman  
15 June 2017