

Ombudsman's Determination

Applicant	Mr T
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Mr T's complaint and no further action is required by NHS BSA.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr T's complaint is that he has been refused a Permanent Injury Benefit (**PIB**).

Background information, including submissions from the parties

4. Mr T was an Ambulance Driver for Mid Staffordshire Health Authority (**MSHA**) from November 1975 to July 1983, when he was ill health retired due to a history of back pain and sciatica.
5. Mr T was then employed on other duties until 1988.
6. In June 1988 Mr T submitted a claim for State Industrial Injury Disablement Benefit (**IIDB**) in respect of a back injury sustained while lifting a patient into an ambulance in June 1981. The claim appears to have been withdrawn in March 1989.
7. In 1990 Mr T submitted a new claim for IIDB for a back injury sustained while lifting a patient into an ambulance on "approx 20.6.82". The Department for Work and Pensions, then called the Department of Health and Social Security (**DHSS**), asked MSHA to verify the incident. MSHA replied in May 1990 that it had no record of an incident on 20 June 1982 and said Mr T had no sickness absence from 15 March 1982 until 14 December 1982, but had taken three days annual leave from 23 to 25 June 1982. MSHA said that Mr T had a history of sickness absence for a recurring back problem. This occurred first in 1977, had caused sickness absence throughout 1981 and had resumed in December 1982 and that Mr T had been retired on medical grounds in July 1983.

8. It appears that Mr T subsequently revised his claim to a back injury sustained on 8 May 1978 when opening the rear door of an ambulance which had stuck. In July 1990, MSHA confirmed to the DHSS that it held a record of the accident which had caused Mr T 'to pull his back'.
9. In September 1990, Dr Penfold, a Senior Medical Officer for the DHSS, requested Mr Hill, a consultant orthopaedic surgeon, who had previously treated Mr T in 1981 and between 1982 and 1983, to examine Mr T and submit a report. Dr Penfold informed Mr Hill about the 1978 accident and said Mr T had claimed benefit due to incapacity for work from 9 to 20 May 1970* certified as lumbago, from 16 June to 28 December 1981 certified as sciatica and lumbar pain, from 14 December 1982 to 16 August 1983 certified as a back injury and disc prolapse and from 11 May 1990 to date certified as low back pain. Dr Penfold said that Mr T had left the ambulance service in 1983 and had a light job until 1988.

**This seems to be a typing error as it appears that Mr T received a State incapacity benefit from 9 May to 20 May 1978 for lumbago.*

10. Mr Hill examined Mr T and in his report of 28 February 1991, among other things, said:-
 - The incident in 1978 had initiated a sequence of changes in Mr T's lumbar spine as a result of which Mr T had suffered increasing discomfort and disability and was now significantly incapacitated.
 - He expected Mr T's condition to persist indefinitely and that he would always be significantly limited for activities involving lifting, bending, pushing, pulling and carrying and also for prolonged sitting and walking.
11. Mr T was subsequently awarded IIDB at 10 per cent from 21 May 1978 increased to 20 per cent from 2 January 1988 for life.
12. In March 1992 Mr T submitted a separate claim for State Reduced Earnings Allowance (**REA**). Mr T said he had 'worn discs lower spine' because of the 1978 accident. He was awarded a REA, which remains payable until his State Pension Age in 2018.
13. In June 2014 Mr T applied for a PIB. He said the injury to his spine was worn discs in the lumbar and cervical regions caused by continuous heavy lifting whilst in the Ambulance Service. He said the injury was slow but progressive.
14. The applicable Scheme regulations are 'The National Health Service (Injury Benefits) Regulations 1995' (**the 1995 Regulations**). As relevant Regulation 3, 'Persons to whom the regulations apply' says:

"(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;"

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.

15. Acting on behalf of NHS BSA, Atos, the Scheme's Medical Advisers, turned down Mr T's application on the grounds that his reported symptoms of neck pain, back pain and sciatica were not attributable to his former duties with MHSA. The Atos doctor said there was no evidence of any incident or series of incidents that could have contributed to his symptoms which were constitutional in nature.
16. Mr T unsuccessfully appealed via the Scheme's two-stage internal dispute resolution (**IDR**) procedure.
17. At IDR stage 1, Mr T queried, why the IIDB award had been made "if I didn't suffer an injury at work" and said the documents included with his appeal showed that he had a permanent spinal injury making him incapable of a regular occupation. He said his injuries were sustained only while working in the Ambulance Service.
18. Another Atos medical adviser gave their opinion that, notwithstanding past State benefit decisions, Mr T had a pre-existing propensity to episodes of back and right posterior thigh symptoms, which were not attributable to his NHS employment.
19. NHS BSA accepted the medical adviser's opinion and turned down Mr T's stage 1 appeal.
20. Atos maintained its previous position at IDR stage 2, which NHS BSA duly accepted and turned down Mr T's final appeal.
21. The relevant medical evidence is provided in the Appendix.

Adjudicator's Opinion

22. Mr T's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised briefly below:-
 - Regulation 3(2) of the 1995 Regulations applies where an injury sustained or a disease contracted in the course of NHS employment is attributable to the NHS employment / duties of the NHS employment and the injury or disease is an operative/effective cause of a PLOEA of more than 10 per cent. Answering

either question is a finding of fact for NHS BSA, or Atos under a delegated power – original decision only.

- NHS BSA had complied with the Scheme's Regulations and considered all the relevant medical evidence.
- While Mr T had been awarded IIDB for life and was receiving REA to SPA for the industrial accident in 1978, NHS BSA were not fettered by either decision. It was required to make its own decision after considering the medical evidence and may prefer the opinion of its medical adviser unless there was a cogent reason why it should not or should not without clarification.
- It was not disputed that Mr T had a back condition and that he was unable to discharge his former NHS duties. The dispute was whether Mr T's disability was attributable to his duties whilst in the Ambulance Service.
- Mr Hill considered the accident in 1978 had initiated a series of changes in Mr T's lumbar spine, as a result of which he had suffered increasing discomfort and disability and was now significantly incapacitated. The Atos doctors disagreed.
- The first Atos doctor concluded there was no evidence of any incident or series of incidents that could have contributed to Mr T's symptoms which were constitutional in origin.
- The second Atos doctor, at IDR stage 1, commenting on Mr Hill's February 1991 report said Mr Hill had not addressed the prior history of Mr T's back pain from 1970, his lack of incapacity at/around the time of the 1978 incident, the fact that Mr Hill's own contemporaneous correspondence indicated that Mr T had spontaneous onset of episodes of back pain in the 1980s and the RTA with back symptoms in 1981.
- The second Atos doctor's reference to Mr T's back pain in 1970 appeared to be linked to a typing error in Dr Penfold's request to Mr Hill in September 1990. Mr T appeared to have received a short-term incapacity benefit from 9 to 20 May 1978 following the accident. It was also noted that the orthopaedic notes for 30 November 1981 had said Mr T's "Back is fine and would be able to go back to work other things being equal".
- The third Atos doctor, at IDR stage 2, said the GP clinical records and specialist reports indicated that Mr T had suffered a soft tissue injury in 1978 which had improved. The Atos doctor also noted that Mr T had reported back pain after lifting a patient in 1977. But in both instances, after a short absence, he had resumed his regular duties. The Atos doctor further noted that Mr T had attended his GP on several occasions in 1981 and 1983 with exacerbations of back pain and neck pain which had started spontaneously or were triggered by non-work related factors like the RTA; and that there was no evidence of ongoing GP attendance or recent treatment due to back problems. The third

Atos doctor concluded given the relatively low impact nature of Mr T's reported injuries at work in 1977 and 1978 and subsequent resolution of symptoms it could not be accepted that they resulted in permanent incapacity or were attributable to Mr T's current symptoms. It was also not possible to accept that any injury, series of injuries, accumulation of work trauma or the nature of Mr T's work had caused his reported back problems.

- While NHS BSA preferred the opinion of its medical adviser to that of Mr Hill, concerning the impact of the 1978 incident on Mr T's back condition, a difference of medical opinion was not sufficient for the Ombudsman to say that NHS BSA decision was not properly made.
- It appeared that appropriate consideration had also be given to the cumulative effect of the nature of Mr T's duties whilst in the Ambulance Service. NHS BSA accepted its medical adviser's opinion that there was no evidence of an accumulation of work trauma or the nature of Mr T's work had caused his back problems.
- Mr T clearly did not agree with NHS BSA's decision. But the decision NHS BSA had made was one that it could reasonably make based on the medical evidence available.

23. Mr T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr T provided his 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 Mr T for completeness.

Ombudsman's decision

24. Mr T says when he joined the Ambulance Service in 1975 he had no spine related injury and it was not until the late 1970's that he started experiencing back pain, which Mr Hill attributed to continuous heavy lifting.

25. Mr T says Mr Hill did not inform him that if he returned to his full regular duties his spinal injury would worsen. But it did and he says he was retired on medical grounds because of "my [p]ermanent spinal injury".

26. As the Adjudicator said in his Opinion, my role in this matter is not to review the medical evidence and come to a decision as to Mr T's eligibility for a PIB. I am primarily concerned with the decision making process and the medical (and other) evidence is reviewed in order to determine whether it supports the decision made by NHS BSA. The matters I consider include: whether the relevant regulations have been correctly applied; whether appropriate evidence has been obtained and duly considered; and whether the decision is supported by the evidence.

27. I am satisfied that NHS BSA has abided by the Scheme's Regulations and has considered all the relevant evidence; and that the decision it made, at IDR stage 2,

was one that it could reasonably make based on the medical evidence commenting on Mr T's back condition whilst in the NHS Ambulance Service.

28. As the Adjudicator said, while NHS BSA preferred the opinion of its medical adviser to that of Mr Hill, concerning the impact of the 1978 incident on Mr T's back condition, a difference of medical opinion is not sufficient for me to find that NHS BSA's decision was not properly made.
29. Mr T has submitted the results of a 15 August 2016 X-ray of his thoracolumbar spine. But as this report was not available to NHS BSA when it made its final decision it is not relevant to my determination.
30. Therefore, I do not uphold Mr T's complaint.

Anthony Arter

Deputy Pensions Ombudsman
22 March 2017

Appendix

Extract from record of benefits paid to Mr T whilst with MSHA

Type	From	To	Nature of Incapacity
IB	7.9.77	17.9.77	Injury to Back
IB	9.5.78	20.5.78	Lumbago
SB	17.2.81	28.2.81	Backache
SB	16.6.81	28.12.81	Sciatica / Lumbar pain
IVB	29.12.81	16.1.82	
IVB	25.2.82	13.3.82	Painful neck
SB	14.12.82	17.12.83	Back injury
SB	21.12.82	29.6.83	Back injury – Lumbar disc prolapse
IVB	30.6.83	16.8.83	Disc prolapse

Mr Hill, Consultant Orthopaedic Surgeon, 27 July 1981

“...X-rays are normal, thus confirming the clinical impression of a low lumbar disc derangement, I think he would be most rapidly improved by a plaster jacket and this will be put on today.”

Mr Hill, 20 February 1991 report

After examining Mr T's present condition Mr Hill said:

“[Mr T] is subject to pain in the lower lumbar area basically on the right side and radiating to the right buttock and back of the right thigh. On occasions the discomfort spreads up the spine to the interscapular area. It is present even when lying down and causes him to wake in the night. It is exacerbated by sitting limiting his time in this position to about thirty minutes. It is made worse by walking which is limited to about thirty yards and by standing which is limited to about twenty minutes. In particular is...exacerbated by lifting and bending.

...

The incident of May, 1978 initiated a sequence of changes in the lumbar spine as a result of which [Mr T] has suffered increasing discomfort and disability in that area. He is now significantly incapacitated as noted in a previous section.

On the whole I would expect [Mr T's] present level of discomfort and disability to persist indefinitely. It may well vary from time to time, but he will always be significantly limited for activities involving lifting, bending, pushing, pulling and carrying and also for prolonged sitting and walking."

Extract of relevant entries from orthopaedic notes taken by the IIDB Adjudicating Medical Officer in May 1991

- "27.7.81 Off work as ambulance driver for 5 wks: low back pain radiating back of [right] thigh. Started spontaneously as a niggle 3 wks previously. No obvious cause.
Past history – couple of short spells off work "pulled muscle" last time...
...Back moderately stiff
...
Adv – Plaster jacket, LS support
- 10.8.81 Greatly improved...
- 24.8.81 More or less asymptomatic
- 28.9.81 Pain no worse, no better since first seen...
- 30.11.81 Much better...
Involved in RTA...
Back is fine and would be able to go back to work other things being equal.
Discharge
- 23.5.83 Came back...recurrence of back pain exactly as in 1981
Now off work since Xmas
Back pain radiates down [right] leg to just below knee cap...
Rpt xrays – essentially normal except for some possible facet degeneration L5/1
Plaster jacket.
- 20.6.83 Plaster jacket off...
- 15.8.83 Pain free and full range of movement
Discharge
- 20.6.88 Since 1983 has been much better

At end of day has severe burning pain in lower back due to [working/walking – unclear]
Occasional burning sensation round lower back."

Mr Dove, Consultant Orthopaedic Surgeon, 4 July 1994 letter to Mr T

“I am pleased to confirm that although I know you are having trouble with your back, there is no evidence of progressive arthritis and no particular reason to expect your back to get worse in the long term.”

Atos’ 18 November 2014 decision, Atos doctor’s comments

“[Mr T] was absent from 17/08/1981 – 17/01/1982 had two further short spells of absence and then commenced long term sickness absence on 13/12/1982. He was medically retired in 1983 due to a history of symptoms of back pain and sciatica. He sustained a head injury in a road traffic accident in November 1981 and was under the care of a psychiatrist. The GP, Dr Keating, who completed his application form [for ill health retirement] on 3rd May 1983 made no reference to any work related injuries and advised that he was permanently unfit for his normal duties.

A report was requested from Mr Hill, dated 14/07/1983, Mr Hill stated that he had first met [Mr T] in July 1981 at that time he had been off work for five weeks because of “spontaneous” low back discomfort radiating to his right thigh. He was treated in a plaster jacket and then had physiotherapy. He attended again in May 1984, he had been off work for five months with a recurrence of the same symptoms, he was put in plaster and at the time the report was written was having physiotherapy. X-rays taken in July 1981 and May 1983 were reported to be normal. His opinion was that [Mr T] had a low lumbar intervertebral disc derangement. He anticipated that his treatment would render him pain free and advised that he avoid returning to his usual, physically demanding duties. Following receipt of this report his application [for ill health retirement] was accepted.

He next consulted with symptoms of back pain and sciatica in 1988 and was referred to orthopaedics. A referral letter to Mr Hill dated 2nd March 1988 referred to degenerative changes being identified in 1983 when he was X-rayed. A letter dated 5th October 1988 to the GP notes that he had improved significantly with physiotherapy and he was discharged from the clinic.

He applied for mobility allowance in 1990 and at that time was reported to be mobile with a stick, stopping after 35 yards, He was awarded invalidity benefit in June 1990 and found unfit for work.

He was referred to Mr Dove, Consultant Orthopaedic Surgeon in 1993, because of persisting symptoms of pain. He was referred for physiotherapy and was reassured that X-rays had not revealed any significant abnormality.

There are no consultations recorded in the GP notes with back related symptoms until December 1982. He had consulted with symptoms of acute neck pain in January 1982. It is noted that he attended Mr Hill in 1981, therefore these records must be missing.

The extract of the hospital records dated 09/05/1992 refers to an X-ray report dated 23/05/1983 identifying possible facet joint degeneration at L5/S1.

The request for a medical report from Mr Hill from Dr Penfold dated 11/09/1990 refers to an incident on 08/05/1978 when [Mr T] developed symptoms of back pain after opening an ambulance door which got stuck. There is no documentary evidence of this incident which appears to have been accepted as an accident some 12 years later. It is unclear why Mr Hill considered that this incident contributed to the spontaneous development of acute symptoms of back pain some 3 years later. There is no evidence that [Mr T] was off work following this alleged incident.

It is noted that Dr Alvarez [GP] has confirmed that [Mr T] has not consulted with symptoms of back pain since 2003 and has not required regular medication for pain relief. In April 2012 his activity level was recorded to be "moderate".

Concluding advice:

Having carefully considered the medical evidence it is advised that the applicant[']s reported symptoms of neck pain, back pain and sciatica are not attributable to his former duties. There is no evidence of any incident or series of incidents that could have contributed to his symptoms which are constitutional in origin."

Extract from Atos doctor's opinion, IDR stage 1

"The applicant states his dispute is based on his award of Industrial Injuries Disablement Benefit (IIDB) for life. He queries 'if I didn't suffer an injury at work' why have I been awarded this. He states that the enclosed State benefits documents state that he has a permanent spinal injury making him permanently incapable of regular occupation. These injuries were sustained only while working in the Ambulance Service.

He states that as there is no operation or treatment that can help his disability, I manage my condition with daily pain relief.

...

On 09/05/91 the Adjudicating Medical Authority [in respect of Mr T's IIDB claim for the 1978 injury] summarised medical records as follows:-

27/07/81 off work as an ambulance driver for 5 weeks because of low back pain radiating to right thigh, started spontaneously, no obvious cause. He was advised plaster jacket and was greatly improved by 10/08/81.

He was involved in a RTA 2.5 weeks ago...bumped his right hip and bumped his head. His back was fine and he would be able to go back to work all other things being equal.

23/05/83: Recurrence of back pain exactly as in 1981. Now off work since Christmas.

(There is no mention of work injury – my parenthesis). By 15/08/83, after treatment with a plaster jacket, he was pain free, had full range of movement and was discharged.

20/06/88: he has been much better since 1983. He has severe burning pain in his lower back due to working/walking (unclear).

In his statement at assessment for IIDB dated 02/08/90 the applicant states:

Mr Hill advised he had spinal arthritis

He carried on working for a year after the claimed accident on 08/05/78

He went back to his own job after treatment with a plaster jacket

He was given a light job to 1988

He gets pain and weakness right leg

He had a car accident in 1981 which makes him dizzy and he has a problem with his right hip.

Mr Hill writes:

27/07/81: X-rays are normal, thus confirming the clinical impression of a low lumbar disc derangement. I think he will be rapidly improved by a plater jacket and this will be put on today...

Mr Hill wrote on 14/07/83:

The applicant first came under his care in July 1981. At that time he had been off work as an ambulance driver for five weeks because of spontaneous low back discomfort radiating into the back of the right thigh. He was treated in a plaster jacket and then with out-patient physiotherapy and was discharged towards the end of the year,

He attended again on 23/05/83. At that time he had been off work for 5 months because of spontaneous recurrence of low back pain radiating down the back of the right thigh. He was put in plaster, which has since been removed, and is undergoing out-patient physiotherapy.

He suffers from low lumbar intervertebral disc derangement, and although treatment may well render him pain free, work involving extensive or repeated pushing, pulling, lifting or carrying are likely to precipitate a further episode of back discomfort with further time off work. This situation I would expect to persist permanently and in addition there are likely to be spontaneous exacerbations from time to time.

In the report dated 20/02/91, which was commissioned by the IIDB Medical Officer, on 11/09/90, Mr Hill,..., offers an opinion that; the incident of May 1978 initiated a series of changes in the lumbar spine as a result of which the applicant has suffered increasing discomfort and disability in that area. He is now significantly incapacitated. He will always be significantly limited for activities involving lifting, bending, pushing, pulling and carrying and also for prolonged sitting and waiting.

Mr Hill does not address:

the prior history of back pain from 1970 (including with related sickness absence)

the lack of incapacity at/around the time of the relevant incident of May 1978
the fact that his own, contemporaneous correspondence indicates that the applicant had spontaneous onset of episodes of back pain in the 1980s
the RTA with back symptoms in 1981.

He was awarded IIDB at 20% disablement for life on 24/06/91 for back strain and impaired spinal function, handicapped for bending and lifting

On 16/03/92 the applicant stated (Reduced Earnings Allowance (REA) application) that he had worn discs lower spine and that Mr Hill had advised him not to do any work that has any lifting, continuous sitting, standing bending or walking involved.

These awards appear to have been based on Mr Hill's opinion.

ATTRIBUTION

It is considered, based on all of the evidence available (and notwithstanding past State benefits decisions based on the evidence available to decision makers at that time), this applicant has a pre-existing propensity to episodes of back and right posterior thigh symptoms, which is not at all attributable to his NHS employment.

The evidence indicates that this applicant has a history of back related symptoms dating back to 1970.

...

The evidence does not confirm on balance that his current claimed symptoms are at all attributable to the claimed work incident in 1978, to any other work incident or to any accumulation of work trauma.

The reason for ill health retirement was lack of resilience to his NHS role because of his propensity to spontaneous episodes of back pain (in relation to heavy physical exertion from any source)."

Extract from Atos doctor's opinion, IDR stage 2

"The evidence review, particularly the detailed analysis of contemporaneous GP clinical records and specialist reports indicates that [Mr T] sustained a soft tissue injury to his back on 08/05/1978 which has improved. He also reported back pain after lifting a patient in September 1977 which did not result in any long term incapacity. He was able to resume his regular duties at work after approximately 10 days absence, on both occasions.

He attended GP on several occasions between 1981 and 1983 with exacerbations of back pain and neck pain which started spontaneously or were triggered by non work related factors like RTA (neck pain),

There is no evidence of ongoing GP attendance or recent treatment due to back problems.

Given the relatively low impact nature of his reported injuries at work in 1977 and 1978 and subsequent resolution of symptoms it cannot be accepted that they resulted in permanent incapacity or are attributable to his current symptoms. It is also not possible to accept that any injury, series of injuries, accumulation of work trauma or the nature of his work caused his reported back problems.

The evidence indicates that [Mr T] has constitutional propensity to episodes of back pain and had exacerbations of his symptoms in 1981 and 1983, which spontaneous nature was confirmed by the Consultant Orthopaedic Surgeon, Mr Hill in 1983.”