

Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHSBSA)

Outcome

1. Mrs N's complaint is upheld and to put matters right NHSBSA should reconsider whether her condition as a result of an incident in 2005 (the **Incident**) was wholly or mainly due to her NHS employment and, if so, whether she has suffered a permanent loss of earning ability (**PLOEA**) of more than 10%.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs N complaint is about the rejection by NHSBSA of her request to receive a Permanent Injury Benefit (**PIB**) under the Scheme.

Background information, including submissions from the parties

4. Mrs N was a Community Mental Health Nurse employed by NHS until her employment ceased on grounds of ill health on 20 January 2014.
5. Mrs N was involved in a number of internal and external reviews as a result of the Incident in which a patient, of the team she was working for, killed his ex-partner and injured another individual. The Incident occurred in 2005, but the reviews were carried out over a significant period of time (from 2005 to 2010).
6. Mrs N became very anxious and depressed, and was treated with numerous psychiatric medications since 2005. She made numerous attempts to return to work, but, on each occasion, she became rapidly unwell again.
7. Mrs N applied for and was granted an ill health pension under the NHS Pension Scheme in November 2013. At the time she retired early on grounds of ill health (i.e. January 2014) she was 38 years old.

8. In October 2014, Mrs N applied to NHSBSA for a PIB under the Scheme. In her application, she cites the Incident for her claim for a PIB. On the application she completed in response to the question "Please confirm the date of the Incident you are claiming for", she says "2/3 Feb 2005". In response to the question "Please provide more detail of the incident. Did you witness the event? If so where did the incident take place?", she says:

"A patient of the team I was working for killed his ex-partner and injured another individual. I had had contact with the victim and had also been asked to go and see him alone on the day of the incident. I had also had contact with the victims<sic> family. I was informed of the death by a colleague the following morning the incident occurred in the community".

In response to the section of the application headed: "Please provide more detail of the investigation and how this affects you", she says:

"I was involved in an internal, external and IPCC enquiry. I was also investigated by the NMC. I did not have to attend the coroners court due to the effect of the enquiries on my mental state. I became very anxious and depressed, in part because I related to the victim as a single parent and felt it could easily have been myself who had been killed had I have gone to see him. I have been treated since 2005 with numerous psychiatric medications and required an inpatient admission in 2007...I was medically retired in January 2014. Since then my mental state has improved enough to allow me to reduce my medication although I remain on an antidepressant. My recovery has been aided by the reduction in managing risk which I have been left unable to cope with which obviously limits my future employment options as I will be unable to return to nursing. Whilst my mental state has improved I have been left with a significant vulnerability to relapse especially when faced with stressful situations, and a heightened awareness of risk...".

9. The appropriate regulations are the National Health Service (Injury Benefits) Regulations 1995 (as amended) (the **1995 Regulations**). The relevant sections are regulations 3 and 4 which are set out in the Appendix.
10. In March 2015, OH Assist, the medical advisers for the Scheme, wrote to Mrs N setting out the Scheme criteria for payment of a PIB; the evidence considered; and a synopsis of her GP records. They concluded:

"It is my opinion that, on the balance of probabilities, the evidence in this case confirms a period of depression and anxiety (between 2005 and August 2006), was contracted in the course of the person's NHS employment and was mainly attributable to that NHS employment.

It is my opinion that the<sic> on the balance of probabilities the evidence in this case does not confirm that the incapacitating effects of the accepted condition are permanent.

Since there are no relevant permanent incapacitating effects there is no relevant permanent loss of earning ability.”

11. Mrs N appealed the decision not to award her a PIB and the matter was dealt with under the Scheme’s internal dispute resolution procedures (**IDRP**). NHSBSA referred the matter to OH Assist for comment. OH Assist’s conclusion was that, on the balance of probabilities, the period of depression and anxiety (between 2005-2006) was contracted in the course of her NHS employment and therefore mainly attributable to that employment; but the incapacity caused by her ill health in this period was not permanent, therefore, there was no PLOEA. NHSBSA wrote to Mrs N setting out OH Assist’s comments and conclusions, which they said appeared to be reasonable. They added that OH Assist had sought the latest reports from the consultant who treated her and the reports did not confirm that her current condition is a result of the Incident, just a contributory factor.
12. Mrs N appealed the stage one IDRP decision and the matter was considered under stage two. NHSBSA once again referred the matter to OH Assist for comment. OH Assist’s conclusion was that her condition was due to a number of contributory factors including substantial non-work related factors; the evidence presented demonstrated that she had made a good recovery; and, therefore, there was no PLOEA attached to the symptoms resultant from the Incident. NHSBSA wrote to Mrs N saying:

“...the medical adviser is saying that your recurrent depression condition is due to a number of contributory factors which include substantial non work related factors. As such it cannot be accepted that the condition for which you have claimed PIB is wholly or mainly attributable to your NHS employment. In reaching this conclusion, it is acknowledged that you suffered significant depressive symptoms following the event of February 2005 and subsequent investigations. The medical adviser has explained that the evidence presented demonstrates that you made a good recovery following psychological treatment and therefore there is no permanent loss of earning ability attached to the symptoms resulting from this incident.

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 her findings. Nor do I consider that her conclusion is perverse; that is, one which no reasonable body of people could have reached based on the same evidence. As such my decision is that you are not entitled to Permanent Injury Benefits because your ongoing recurrent depression is not wholly or mainly attributable to your NHS employment.”

Adjudicator's Opinion

13. Mrs N's complaint was considered by one of our Adjudicators who concluded that further action was required by NHSBSA. The Adjudicator's findings are summarised briefly below:
- Under the 1995 Regulations the questions that NHSBSA and OH Assist needed to address in Mrs N's case were:
 - Was her condition, as a result of the Incident, wholly or mainly attributable to her NHS employment?
 - If her condition was wholly or mainly attributable to her NHS employment, did this led to a PLOEA of more than 10%?
 - There was a flaw in the way that both OH Assist and NHSBSA, under their stage one IDRP decision, approached the analysis of whether Mrs N had suffered a PLOEA by reason of the injury or disease. The correct method in assessing any PLOEA caused by the accepted condition is to identify alternative suitable employment that the applicant is likely to be able to undertake before reaching retirement age and compare the potential income from that with the income the applicant was receiving prior to the reduction or loss. It is necessary to measure the applicant's ability to work across the whole of the general field of employment and take into account the accepted condition, age, intellectual and academic ability, qualification and experience. These issues were not considered by OH Assist or NHSBSA at the time of the initial decision or at the stage one IDRP, respectively.
 - The decision made by NHSBSA under stage two IDRP was a complete reversal of the initial decision and the stage one IDRP decision. The reason they gave Mrs N for not awarding her a PIB was because her ongoing recurrent depression is not mainly attributable to her NHS employment. The question that they appear to have asked is whether her ongoing recurrent depression is wholly or mainly attributable to her NHS employment, which is the wrong question.
14. NHSBSA did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHSBSA provided their 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 NHSBSA for completeness.

Ombudsman's decision

15. In response to the Adjudicator's Opinion NHSBSA say:
- Mrs N's application for PIB has been declined throughout the initial application and stage two IDRP on the grounds that her ongoing psychological conditions,

recurrent depression for which she has claimed PIB and which is causing her incapacity to work, is not wholly or mainly attributable to her NHS employment.

- Both the initial decision and the stage one IDRP decision accepted that a temporary period of psychological illness was suffered by Mrs N throughout 2005 and 2006, was mainly attributable to the Incident. However, the ongoing psychological condition of recurrent depression is not wholly or mainly attributable to her NHS employment. Attribution is therefore limited.
- They agree that the initial decision could have been worded more efficiently to explain that on the balance of probabilities the evidence demonstrates that Mrs N suffered a psychological illness during the period 2005 to 2006. However, the effects of this illness resolved and therefore in identifying a postulated employment, there is no reason why she could not have returned to her original job at the same level. Any ongoing psychological ill-health is not considered to be wholly or mainly attributable to her NHS employment, rather it is due to other non-work related factors.
- As the ongoing condition that Mrs N has claimed was caused by the Incident, and continues to suffer from, is not wholly or mainly attributable to her NHS employment, no PLOEA assessment was required as the initial criteria of regulation 3(2) had not been met. It is regrettable that this was not adequately demonstrated in the letter of 13 March 2015.
- The decision under stage one IDRP was, again, that the criteria for regulation 3(2) was not met as the psychological condition that she had claimed PIB for, and is suffering from, is not considered to be wholly and mainly attributable to her NHS employment.
- Stage two IDRP decision was not a complete reversal of the initial and stage one IDRP decisions – it is worded differently. In reaching this decision, which was accepted by the disputes manager, the medical adviser had remarked that the medical evidence showed that Mrs N made a “full recovery from the index event December 2007 to January 2009” and therefore did not accept that all her symptoms stem from events in February 2005.

16. I have carefully considered the points made by NHSBSA and set out my comments below:

- While I appreciate that Mrs N may have an ongoing psychological condition, it is clear from the application she completed in October 2014, that her claim for PIB was based on her mental state resulting of the Incident. Therefore, the question to be answered is whether her condition resulting from the Incident, and not her ongoing psychological condition, is wholly or mainly attributable to her NHS employment.

- NHSBSA's, and OH Assist's, initial and stage one IDRPs decisions were that Mrs N condition resulting from the Incident was wholly or directly attributable to her NHS employment. Having decided that they should have gone on to consider whether she had suffered a PLOEA by reason of the injury or disease. There was no need for them to consider whether her ongoing psychological condition was also wholly or directly attributable to her NHS employment; the fact that they did so meant that their decision was flawed.
- I cannot agree that because Mrs N's ongoing condition may be associated to the Incident, it means that her condition resulting from the Incident was not wholly or directly attributable to her NHS employment. As stated above, they only need to consider her condition as a result of the Incident, and not her ongoing condition.

17. Therefore, for the reasons given above, I uphold Mrs N's complaint.

Directions

18. I direct that within 28 days of this determination, NHSBSA shall reconsider whether Mrs N's condition, as a result of the Incident, was wholly or mainly due to her NHS employment and, if so, whether she has suffered a permanent PLOEA of more than 10%.
19. In the event that PIB is payable, it is to be backdated to 2014, when Mrs N first applied for it, and simple interest is to be added to past instalments at the reference bank rate for the time being, from the due date to the date of payment.

Anthony Arter
Pensions Ombudsman

4 October 2016

Appendix

The National Health Service (Injury Benefits) Regulations 1995 (as amended) (**the Regulations**), regulation 3 states:

“Persons to whom the regulations apply

(1)... these Regulations apply to any person who...

... 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 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; ...”

Regulation 4 sets out the scale of benefits. Regulation 4(1) states:

“... 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, ...”