PO-13579

Ombudsman's Determination

Applicant	Dr A
Scheme	NHS Injury Benefit Scheme (**the Scheme**)
Respondent	NHS Business Services Authority (**NHS BSA**)

Complaint Summary

Dr A has concerns that NHS BSA has incorrectly calculated his Permanent Injury Benefit (**PIB**) award. He disputes:-

1) The method used in calculating his permanent loss of earning ability (**PLOEA**), which forms part of the PIB calculation.
2) The number of years' service taken into account when calculating his PIB.
3) NHS BSA's authority to apply a percentage reduction to the part of the calculation which concerns his average remuneration.

Summary of the Ombudsman's Determination and reasons

NHS BSA shall reassess Dr A's application for PIB because it failed to consider information which suggested that he might not be able to complete his General Practitioner (**GP**) training programme.

I do not however find that NHS BSA has made an administrative error in the methodology applied at the second stage of the internal dispute resolution procedure calculating Dr A's PLOEA, nor do I consider that it has applied an incorrect length of service in this assessment.

In respect to NHS BSA's authority to apply a percentage reduction to average remuneration, I am not able to make a finding of maladministration causing Dr A financial injustice.

However, NHS BSA has caused Dr A serious distress and inconvenience by its changing position on the calculation of his PLOEA and through its failure to assess his PIB application correctly, for which it shall pay him a non-financial injustice award of £1,000.

Detailed Determination

Material facts

1. Dr A sustained a psychiatric injury resulting in a depressive illness whilst working for an NHS employer as a GP registrar.

2. On 18 November 2011, he commenced long term sickness absence following the injury.

3. Having returned to work on a phased return, from 20 January 2014, Dr A changed his contracted hours from full-time to 60% of full-time, meaning that he received lower pay.

4. Dr A subsequently applied for PIB.

5. On 10 July 2015, a Postgraduate Dean from Heath Education East Midlands wrote to Dr A regarding the possible removal of his National Training Number (**NTN**). She said a date was yet to be set to consider this matter. In this letter, she said:

   "To be clear, my concerns about your suitability to continue in your training arise from your lengthy and continuing absence from training due to ill-health of which there appears to be no prospective date for your return, together with my consequent concern over the likelihood of you returning to training for sufficiently long periods to have any substantial prospect of successfully completing your training within a reasonable period; finally I am also concerned as to your lack of engagement in your training."

6. On 1 September 2015, NHS BSA informed Dr A that his application for PIB had been successful. It said its medical advisers had accepted that Dr A had an injury that was wholly or mainly attributable to the duties of his NHS employment and their concluding advice was:

   "It is more likely that once he has improved with treatment, he will be able to resume as a part time (60%) GP registrar earning £41,042.28 per annum. This represents a PLOEA of 40%, in comparison to the earnings figure used to establish PLOEA of £68,401.75. A Band 3 award is therefore considered to be appropriate."

7. On 26 October 2015, Dr A replied saying:-

   - He was not happy with the PLOEA calculation and the quantum of lump sum paid to him.
   - In respect to the PLOEA calculation, the regulations concerned required the average remuneration of a registrar to be increased. It had been agreed since he was a GP registrar that his earnings shall be enhanced to this level. This enhancement therefore ought to extend to the calculation of the PLOEA and the capping of benefits.

- Further, the enhancement ought to be applied before any calculations applying to registrars was undertaken and his loss of earning ability should be calculated in reference to the "ability" he was scheduled to earn but could not earn now.
- The NHS Trust he worked for had accepted his overseas service in India as equivalent to service in the NHS and put him on a SHO 06 pay scale; his salary slips corresponded with this. This service should be taken into account when calculating his PIB award.
- He wished for reconsideration of the issues to take place under the Internal Dispute Resolution Procedure (**IDRP**).

8. On 21 December 2015, NHS BSA responded under stage one of the IDRP. It said:-

- Dr A's PLOEA had been assessed under Regulation 4(4) of the National Health Service (Injury Benefits) Regulations 1995 (**the Regulations**).
- The Regulations were silent on how to determine whether a PLOEA had occurred and did not oblige NHS BSA to use an inflated remuneration figure. It had been decided that the fairest way to determine PLOEA was to use the person's actual salary.
- Regulation 2 allowed NHS BSA to increase the figure used for payment of PIB but did not oblige it to use this figure for the purposes of determining PLOEA.
- The periods of work Dr A had carried out in India did not entitle him to additional NHS service for the purposes of the Regulations.
- NHS BSA had correctly used the pay figure of £68,401.75 when making its decision to award Dr A benefits.

9. On 28 December 2015, Dr A contacted NHS BSA asking further questions about its calculations.

10. On 15 January 2016, NHS BSA responded explaining that NHS BSA administered the Scheme on behalf of the Secretary of State for Health. It said that the Regulations did not specifically state how to determine PLOEA or what type of service outside of the NHS could be accepted; its position was confirmed by its legal advisers. It said the acceptance of service in India for the purposes of determining salary was different to determining salary for PIB purposes.

11. On 20 January 2016, Dr A wrote to NHS BSA saying:-

- Although NHS BSA had said that the Regulations did not specifically state how to determine PLOEA, it had not provided any guidance on how this was generally calculated.
- Average remuneration was defined in section 2 of the Regulations as follows: "(c) in the case of a person eligible for an allowance under regulation 4(3A) or (3D), on the date on which he ceased to be employed as a person to whom regulation 3(1) applies (d) in the case of a person eligible for an allowance under regulation 4(4), (4B), 5 or (5C), on the date on which his emoluments were reduced."

- NHS BSA had used phrases such as actual salary and pay figure, which were not in the Regulations. The closest match to this was the term “emoluments”, defined in Regulation 2(1).
- Regulation 4 referred to “average remuneration” and emoluments when dealing with the matter of calculations and payments.
- Regulations 10 and 13 had referred to “average remuneration”, which suggested this was an integral part of the calculation of PIB.
- He was only one year away from the completion date of his training as a GP trainee (scheduled for completion in August 2012) when he had to go off sick in August 2011.
- He never returned to training for long enough to complete it. He re-joined for a week only in November 2011 and for 11 days in 2014, before he had to go on sick leave again.
- His GP registrar job had been terminated due to his illness with effect from September 2015 and his GP training number was also in danger. In the injury benefit letter of 6 October 2015, the medical adviser acknowledged that his GP registrar job had been terminated, but said he could still obtain a part-time GP registrar post in the future.
- This had not happened to date and he had no job in the pipeline. If his training number had been terminated by the deanery, he would not have any GP registrar post to join. The rules of appointment to GP registrar training state that one could not re-join training if they had been expelled from one.
- The medical adviser then commented that if he did not return to GP training, he could undertake other part-time medical work, such as a sessional Disability Analyst for the Department for Work Pensions, earning £40,000 per annum.
- Taking the above advice, he applied for such a role, working 2 to 3 days a week from early 2016. The job agency came back with two problems, the first being revalidation with the General Medical Council (**GMC**) and the other concerning part-time work.
- He passed his telephone interview and was then advised that any candidate that applied for a part-time job for this role had to give an undertaking that for the first three months, they would work full-time. Without this, they would not be invited for a face-to-face interview. The medical advice was that working full-time for three months would pose a further risk to his health. It appeared that nobody had taken into account such collateral effects before determining the fair loss in his earning ability.
- NHS BSA had recognised his experience in India when he began employment in the UK, so it was grossly unfair that they failed to recognise this service now.

12. On 3 February 2016, Dr A’s GP signed a Statement of Fitness for Work, where he said: “His consultant psychiatrist recommended return to 40% work capacity. I agreed with that recommendation.” Dr A sent a letter to NHS BSA regarding this the same day.

13. On 22 February 2016, Dr A began a new post of GP Speciality Registrar on a 32-month contract at 40% of full-time hours.

14. On 16 March 2016, Health Education England (**HEE**) wrote to the solicitors of the GP practice Dr A was employed by and made the following points:-

- A 32-month contract at 40% of full-time could not be approved as this was contrary to GMC requirements.
- A position statement issued by the GMC in 2011, also referred to in section 6.69 of the Gold Guide (6th Edition 2016), stated that Less than Full-Time Training (**LTFTT**) at less than 50% was not permitted except in exceptional circumstances. In exceptional circumstances, LTFTT between 20% and 50% was permitted, but for a maximum of 12 months.
- Dr A's circumstances could be categorised as exceptional. Assuming he gained approval to train at 40%, he could return to training at that level but for 12 months only. Agreeing a contract for the remainder of his training at 40%, which the practice had sought to do, was outside the permitted limits.
- The GMC would not consider anything beyond the 12-month period as counting towards training.
- It was prepared to support the practice's continued employment of Dr A on the proviso that any period of training at 40% LTFTT subsisted for a maximum of 12 months but was subject to a review in 3-6 months' time.
- It was possible that a sustained improvement would mean that the period of 40% LTFTT could be reduced. After a maximum period of 12 months at 40% LTFTT, Dr A's training commitment must be increased to a minimum of 50% in line with GMC requirements.

15. On 21 March 2016, NHS BSA sent Dr A its stage two interim response. This said:-

- Regulation 2(1) of the Regulations provided that "average remuneration shall be increased to the amount which…represents the average remuneration of…a general medical practitioner…of comparable age."
- Dr A was disputing the pay figure used to determine the assessment of his PLOEA. He had presented arguments which said that the assessment should be made using the average remuneration figure of a GP of a comparable age, £106,179.15, and not the annual rate of pay prior to the commencement of lower paid employment £68,403.75. The annual rate of pay of £68,403.75 was provided by the employer as the figure representing Dr A's pay before the commencement of lower paid employment on 20 January 2014. This was correct. The suggestion that PLOEA should be calculated using an enhanced average remuneration figure of £106,179.15 was not supported by the Regulations. Regulation 4(4) provided for a reduction in emoluments, not average remuneration.
- The Regulations were silent with regard to assessing PLOEA. However, the premise of Regulation 4(4) was to ascertain the percentage of PLOEA against the applicant's pre-loss earnings. This was distinct from the calculation of PIB allowance which provided a percentage of average remuneration. The assessment of PLOEA and the calculation of PIB annual allowance were two separate processes.
- Dr A's service in India was not equivalent to his NHS service.

16. On 26 March 2016, Dr A wrote to NHS BSA; according to the date stamp the Injury Benefit team received this letter on 1 April 2016. Towards the end of the letter, Dr A said:

> "By way of further evidence, I am submitting a recent letter from Health Education England to my employer regarding my re-employment. As you would see from this letter, HEE has clearly written that they are not able to support a 40% return to work and training for myself, for anything more than a year."

17. On 4 April 2016, Dr A's solicitor wrote to the Secretary of State for Health saying:-

- Dr A's period of service had been deemed in the second bracket of 5 years and over but less than 15 years.
- The Regulations prescribed at clause 5 the meaning of the term "service." Upon commencement of his employment with Airedale NHS Trust in 2006, the terms of his employment were amended to recognise a period of 7 years in India. This was reflected in his salary and pension contributions, which were set at a higher band. Hence, Dr A's service had already been recognised for the purpose of a relevant pension scheme.
- Dr A's service of 10 years in the UK combined with the 7 years in India should mean he had a valid period of 17 years. This would place him in the third service bracket for calculating PIB payments.
- In any case, clause 5(c) of the Regulations prescribed that any other period of service that the Secretary of State may approve can be accounted for in the PIB calculation, which Dr A wished to request.
- Regulation 4 stated that the annual allowance should provide an income of the percentage of a person's average remuneration. This was contentious; NHS BSA had incorrectly used Dr A's actual salary figure.
- Average remuneration was defined under Regulation 2. As Dr A was a GP registrar, the figure that must be used was the amount the Secretary of State considered represented the average remuneration of a general medical practitioner of comparable age, not actual salary.
- In conclusion, Dr A's correct period of service should be 17 years and the correct figure to be taken as his average remuneration when calculating his allowance was as defined in the Regulations.

18. On 15 April 2016, NHS BSA sent Dr A its stage two IDRP decision. This said that Dr A was expected to return to work on the basis of 40% employment. It said as a fully trained GP, Dr A was likely to earn far more than he currently was as a GP registrar and it was reasonable to expect that he would earn more than £100,000 pro rata in a GP principal role. Hence, even if he worked on a 40% basis, a loss of earnings ability of no more than 40% was expected. No reference was made to the letter from HEE on the implications this indicated for Dr A's ongoing employment, successful completion of training and GMC registration.

19. On 8 June 2016, the Post-Graduate Dean of HEE wrote to Dr A again regarding removing his NTN and place on the GP training programme. She expressed concerns about Dr A finishing his training, but said no conclusions on this had been reached as yet.

20. Dr A subsequently referred the matter to this Office and mentioned that HEE had terminated his GP Registrar training post.

21. With effect from 21 August 2017, Dr A was assessed as having suffered a PLOEA of more than 50% but not more than 75%.

22. With effect from 8 October 2019, Dr A has been assessed as suffering a PLOEA of more than 75% (Band 5).

Summary of Dr A's position

23. The medical advisers' opinions had varied several times, and did so considerably, in respect to why they thought he should be able to earn £40,000. Also, their projection of his future earnings did not appear to be evidence based. It had initially been said that he would be able to work 60% of a full-time GP registrar post, assessing his potential earning ability to £42,000. They then revised the basis of this calculation using a hypothetical appointment of a Functional Assessor post.

24. Occupational Health then acknowledged that it was unlikely that he could work 60% or more of normal hours in the future and it was predicted that he would be working 40% of the normal hours applying to a £100,000 GP principal role.

25. Hence, it seemed that the medical advisers had always gone from effect to cause rather than vice versa. Further, the fact that NHS BSA projected a similar level of earnings for when he was on a 40% and 60% contract showed the absurdity of its position.

26. The latest medical adviser's opinion was that since he would most likely return to a GP registrar job, he would definitely become a GP principal. This ignored the fact that the latter was not guaranteed and that he was still renegotiating his return to work as a GP registrar. It also disregarded that HEE had confirmed it would not support work or training on a 40% of full-time basis for more than 12 months, when he required at least 32-34 months to complete his GP registrar training. Without the completion of this, he could not be entered into the GMC's GP register.

27. He had applied for non-medical positions but not been successful. NHS BSA had failed to take into account the "massive reduction" in his "attractiveness as an employee" in the eyes of an employer for any good or highly demanding position paying £100,000 or above. Further, this was compounded by the prejudice an employer might have in hiring someone with a mental health condition.

28. The medical advisers acknowledged that his earning ability would have been over £100,000 had he not been ill. However, in assessing his loss of earning ability due to the illness, they had used a figure of £68,401.75. The loss of earning ability should

take into account the person's best projected earnings had they not been ill. Instead, NHS BSA had used projected best future earnings and presented them as a fraction of present rate of pay, producing an artificially low PLOEA.

29. Whilst he agreed with the basic principle that NHS BSA should establish earning ability before and after the injury to arrive at PLOEA, the way in which this principle was applied to his case was not entirely correct. He did not earn £68,401.75 before the date of his PIB application in 2014 and NHS BSA had not shared any evidence to show that his earnings, before the date of its reduction, were £68,401.75. This figure was simply the notional salary of a full time GP registrar in his grade. His total emoluments before eligibility for PIB was £104,775.82.

30. His earning ability before the injury constituted his "ability" to become a GP and earn equal to a GP, whereas subsequent to the injury, he can never become or earn like a GP.

31. The principle of comparing earning ability before and after the injury involved the concept of earnings before the reduction, this being former earnings. Regulation 13(4)(b) states that "former earnings means, in relation to that person, the average remuneration by reference to which the allowance was determined or the annual rate of emoluments at the date on which the allowance becomes payable, whichever is higher."

32. Even if it was believed that £68,401.75 was the annual rate of his emoluments, Regulation 13(4)(b) unequivocally asked this to be superseded with his average remuneration to arrive at his formal earnings figure. It was not in the gift of NHS BSA to alter or substitute these clear directions.

33. He agreed that actual earnings received and "Earning Ability" were two different concepts; his earnings ability should have incorporated his ability to become a GP Principal and earn equal to one. He was only 12 months away from becoming one.

34. Further, with his additional qualification of an MBA, he would have earned even more than an average GP Principal (who usually does not have such qualifications) had he been allowed to continue on his career path, but for the conspiracy hatched by some senior managers in the regional NHS, which included the Postgraduate Dean. The Secretary of State for Health at the time, and the Department of Health, turned a blind eye to this conspiracy. Some managers within the NHS BSA also contributed to it.

35. This conspiracy resulted in his illness and its repeated deterioration. He therefore could not earn what would have otherwise been his earning ability. His earning ability, but for this conspiracy, would have been more than £160,000 taking into account the earnings of a GP Principal, additional earnings from GP Locums, and earnings from managerial work.

36. He had provided evidence that GP Principals earned more than £135,000-140,000 from their GP practice working four times a week, and a further £1,000 per day, if one

did additional locums, which were freely available at these rates. Hence, an earning potential of £160,000-175,000 was easily achievable by full-time GPs.

37. The Regulations were not silent regarding the figures to be used. They clearly defined "former earnings" at Regulation 13(4)(b), as the higher of the average remuneration or the average rate of emoluments, so clearly average remuneration had to be used in his case. The Regulations did not provide anywhere for "average rate of pay" to be used instead of "average remuneration".

38. In relation to his PLOEA, the latest report from NHS BSA's medical adviser dated 29 October 2019, reflecting on the assessments carried out previously, stated: "My consideration is that whilst [Dr A] has demonstrated higher educational competence with regard to his medical and postgraduate training and management competence with his MBA, his psychological status is unlikely to allow him to sustain this form of demanding employment at any time in the future. I have borne in mind his and his GP's and the psychiatrist's comments on trigger factors for recurrence."

39. He also stated, "Therefore consideration for future employment must be at the level of non-specific administrative duties. It is likely though that he would be unable to sustain these type of duties as they would represent a trigger for further depression in their own right highlighting his loss of professional status and impact on his self-esteem as he indeed mentioned to his psychiatrist feeling as though he was "ashamed and a failure". He then went on to award him a Band 5 PIB.

40. The above factors raised by the medical examiner, in his report of 29 October 2019, were present when his stage two IDRP review was carried out in 2016. It was known that he would be thrown out of GP training in the near future, and therefore would never become a GP. It was also known that these factors, highlighted by the medical examiner, would also affect his ability to earn the amount of money NHS BSA (wrongly) postulated that he would earn.

41. Had the stage two assessment been carried out properly in 2016, a result similar to the one agreed now by NHSBSA would have been achieved, and therefore he should have been awarded a Band 5 award at that time. He wished for the Ombudsman to set the matter right and award him a Band 5 PIB award, overruling the determination made by NHS BSA.

42. Regulation 2 required NHS BSA to use "enhanced earnings of a GP while calculating allowances." Since the calculation of a PLOEA was a step towards such a calculation, NHS BSA could not ignore this.

43. NHS BSA had said the Regulations did not specify how to calculate PLOEA. However, the Regulations had specified using enhanced GP earnings to calculate the allowance paid to "Registrars" in his position.

44. In terms of the number of years' service he had carried out and specifically, NHS BSA's non-acceptance of his Indian service, his solicitor's view was that Regulation 5 of the Regulations was clearly satisfied in his case. This was because his higher

earnings, as a result of his Indian service, were used as the basis for his pension contributions.

45. Regulation 5(b) defined service as "any period of employment that would be taken into account for any purpose of a relevant pension scheme." his emphasis was on "for any purpose." This would include NHS Pensions' act of charging him (and his payment of) pension contribution into NHS Pensions. In a letter dated 16 March 2015, NHS Pensions advised that the Cash Equivalent Transfer Value (**CETV**) of his accrued pension benefits was £39,225.67. This CETV was based on the pension contributions which had been paid into the Scheme by him and his employer. Another document from NHS BSA showed his pensionable salary, with his contributions. The amount of these contributions had been fixed depending on his "salary point" on the Registrar salary scale which was decided by adding the number of years' service carried out in India, to his NHS service. Therefore, his Indian service had already been used for "the purpose" of charging him his pension contributions.

46. In terms of the reduction he was disputing, Regulation 2 did not confer any powers on NHS BSA to decrease GP remuneration to 87% of its value; GP remuneration in its entirety had to be used. Further, NHS BSA had failed to provide any credible logic behind this reduction.

47. A document provided by NHS BSA's Freedom of Information department stated that 100% of GP remuneration had been prescribed; the 87% reduction had only been agreed for those Registrars who were on a salary scale of up to £16,330.

48. NHS BSA had referred to a letter in which GP remuneration was stated as being £93,900. However, its letters of September and October 2015, mentioned a GP remuneration of £122,045.

49. In these letters, NHS BSA supplied figures regarding the average remuneration of GPs. Figures on average remuneration of GPs, supplied by the Department of Health to NHS BSA in November 2014, were based on a "top of the head guess" or were old figures from previous years. Attached with this was the Department of Health's official figures of GP average remuneration from 1949 to 2015. The figures of 2014 corresponded exactly to the ones provided by NHS BSA in its letters of September and October 2015. The figures provided by the Department of Health corresponded with the figures of 2007 and 2008. In his case, the figures of 2014 and 2015 must be used in preference to the figures of 2007 or 2008 because he was still working full time during these years.

50. NHS BSA had stated that the reduction was due to him being on a Registrar grade. However, there was no such provision which provided for this reduction, aside from an agreement between Department of Health and the British Medical Association (**the BMA agreement**), which said that Registrars who had salary scales higher than a certain value must have 100% of GP remuneration used as their average remuneration. Further, this document clearly showed that above the salary of £19,610 per annum, 100% of GP remuneration was to be used for Junior Doctors.

51. He agreed that NHS BSA was a Special Health Authority, however the Statutory Instrument cited did not confer decision-making powers to NHS BSA.

52. NHS BSA had failed to provide any evidence which showed that after 1 August 2016 he would become fit to work more than 40% of full-time hours. He was still not fit to return to work. Although this would be reviewed in 3-6 months' time, NHS BSA presumed the outcome of this review. Presumption could not be equated to evidence, particularly a presumption which transpired to be incorrect.

53. NHS BSA's decision in April 2016, was made 11 days after the return to training date suggested by HEE. What efforts did NHS BSA make, up to 15 April 2016, to find out whether he had returned to training? Having known before 15 April 2016 that he had not returned to training, NHS BSA should have sent his case back to the medical advisers for reassessment of his PLOEA using an alternative employment.

54. Despite the knowledge that HEE was looking to terminate his NTN, it did not appear that NHS BSA had written to HEE to gather more information on this.

55. His treating psychiatrist had strongly recommended that "a neighbouring Deanery would be better in terms of providing him with [sic] opportunity to start afresh" and also said that he would require a mentor. It was on strict provision of these conditions that the psychiatrist considered he might clinically improve and/or be able to join training in a few months. The Dean had deliberately disregarded these recommendations and refused to accept them as she wanted to "tip [sic – set?] off" his illness. NHS BSA did not find out whether these conditions had been met and it was possible that he was being set up by it and the Dean.

56. NHS BSA had accepted that his illness deteriorated after the termination of his NTN and its medical adviser had determined his PLOEA, after termination, as at least 51-75%. The knowledge of this termination existed on 15 April 2016, so his PLOEA was at least 51-75% on that date.

57. In a letter of 18 May 2018, NHS BSA's medical adviser commented that his PLOEA award of 26-50% was "a little ungenerous" and that his PLOEA was more likely to fall into the 51-75% band. The medical adviser was talking about the wrongly determined PLOEA award. The new PLOEA was determined in May 2018, on the basis of an alternative employment in the knowledge that he would not become a GP. Had the medical adviser considered the termination of his NTN properly in April 2016, a similar assessment of his PLOEA would have resulted.

58. The Ombudsman should substitute NHS BSA's PLOEA with a PLOEA determined by him to bring the matter to a close. Failure to do so would result in the continuation of the status quo.

59. He requested that the Ombudsman make a binding decision of a PLOEA of more than 75% and direct NHS BSA to pay him arrears from the date his PIB was due, 20 January 2014, with interest at the rate of 8% p.a.

60. The Ombudsman should also make a further binding decision determining that the average remuneration figure that applies is £122,045. Further, an additional award of at least £20,000 should be awarded to him for this injustice.

61. Most recently, NHS BSA had carried out a second deterioration review. In the outcome letter of 29 October 2019, it was evident that the medical adviser had advised that it was not possible for him to earn the amount previously determined as his earning ability. The medical adviser had accepted that his PLOEA was over 75% and advised that his PIB should be paid at band 5.This was the most rational assessment of his situation and a proper acknowledgement of his condition and its effects on his earning ability.

Summary of NHS BSA's position

62. NHS BSA was satisfied that it had correctly considered Dr A's application for PIB and awarded benefits in accordance with the Regulations.

63. In assessing any PLOEA, the Scheme's manager will identify a hypothetical postulated 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 applicant's salary prior to the reduction. They will take into account the applicant's accepted condition, age, intellectual and academic ability, qualifications and experience, but not the availability of or applicant's disinclination to take up such employment.

64. The annual rate of pay figure used to assess permanent loss of earning ability was the higher of the best of the last three years total pensionable pay, or the annual rate of pay prior to commencing lower paid employment. In Dr A's case, his employer confirmed that his annual rate of pay, prior to commencing lower paid employment on 20 January 2014, was £68,403.75. As Dr A's application for PIB was considered as at the date he commenced lower paid NHS employment, it was this higher pay figure which was used.

65. The highest pay figure by way of the best of the last three years total pensionable pay and the annual rate of pay demonstrated Dr A's earning *ability* (its emphasis) prior to the reduction by reason of the qualifying injury in January 2014. It was important to understand that there was a difference between earnings received and earning ability.

66. Regulation 4(1) provided that: "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."

67. The Regulations were silent as to how the assessment of PLOEA should be carried out. A fair and reasonable approach is to use the highest pay as described, as this demonstrates the applicant's earning ability within the last three years prior to the

lower paid employment commencement date and also provides the more favourable result for the applicant.

68. In respect to average remuneration, Dr A was employed as a GP registrar. In accordance with the interpretation of average remuneration within Regulation 2, it is the average remuneration of a General Practitioner of a comparable age which is used for the purpose of calculating the annual allowance. This was a figure of £106,179.15. Dr A's suggestion that PLOEA should be calculated using a higher pay figure was not supported by the Regulations.

69. A percentage of 87% was applied to the average GP remuneration figure of £122,405 in Dr A's PIB calculation because the wording of Regulation 2(1) allowed it to increase the average remuneration to the amount which, in the Opinion of the Secretary of State, represented the average remuneration of a General Practitioner of a comparable age. An agreement had been reached many years ago between the Department of Health and the British Medical Association (this being the BMA agreement) in relation to the percentages which could be used to determine this.

70. The Scheme provided compensation for the fact that junior doctors such as Dr A would have had a higher income if they had continued in employment within General Practice. This was done by calculating the amount of PIB payable by using a notional salary they would have earned as a GP, rather than their actual pensionable pay prior to the crystallisation date of their application. This is what "average remuneration", defined at Regulation 2C(4), sought to achieve.

71. The Pensions Ombudsman had previously determined in PO-11948 that in calculating PLOEA, NHS BSA "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…Rather, the question is whether the medical experts believed she would be capable of carrying out such a role." This supported the methodology it had undertaken.

72. Dr A had been informed by the Department of Health that the average remuneration of a general medical practitioner of age 40 to 44, as at 19 September 2014, was £93,900. This was significantly less than the average remuneration figure of £106,179.15 used to calculate his PIB annual allowance. Therefore, a fair and reasonable approach was taken by the Scheme administrator regarding the amount of the increase which, in the opinion of the Secretary of State, represented the average remuneration of a GP (of a comparable age). The 87% figure used to determine average remuneration in Dr A's case was based on the fact that he was a registrar grade and this was the percentage considered to be appropriate.

73. Although Dr A's GP agreed with the Consultant Psychiatrist's recommendation of a return to work at 40% work capacity, it was noted that the period for which the fitness for work certificate applied was 3 February 2016 to 1 August 2016, a limited and specific period of time.

74. HEE's letter of 16 March 2016, stated that after a maximum period of 12 months at 40% LTFTT, Dr A's training commitment must be increased to a minimum of 50% in line with GMC requirements. The letter concluded that a return to a training date of 4 April 2016 would be realistic. It understood that Dr A would only be permitted to return to training at 40% of full time until 4 April 2017, at which point he would need to increase his training commitment to at least 50% LTFTT. There was no indication at this time that Dr A would be unlikely to increase to a minimum of 50% LTFTT.

75. It was not unreasonable for the Scheme's medical adviser to conclude that in the time up to age 65, Dr A would be able to become a GP principal; noting that the formal decision under stage two of the IDRP was made on 15 April 2016, 11 days after the return to training date suggested by HEE. Given: Dr A's previous experience; the fact that Dr A had only just returned back to training; the medical evidence held; and the Scheme medical adviser's comments, NHS BSA had no reason to disagree with the medical adviser's recommendation.

76. As at 4 November 2015, the opinion of Dr A's consultant psychiatrist was that he was gradually improving and that he suspected that this recovery would continue, recommending specific adjustments.

77. The medical adviser clearly considered that Dr A would be capable of completing his training in order to achieve a part-time GP Principal role in the time up to age 65. If this was not the case, it would be expected that the medical adviser would have considered an alternative postulated employment and advised accordingly at the time.

78. This was supported by a report Dr A subsequently provided for his deterioration review. The report detailed that his Consultant Psychiatrist would support him getting back to training part time over a phased period. He recommended that Dr A "starts at a work level of 40% building it up gradually over weeks."

79. It did not agree that it had changed its position in relation to how it had determined PLOEA. In September 2015, the Scheme's medical adviser's opinion was that in the time up to age 65, Dr A would be able to return to work as a part time GP registrar, working 60% of full-time hours earning £41,042.28 a year. When compared to his pre-loss pay of £68,401.75, this equated to a PLOEA of 40%. Therefore, this was a before and after assessment of earning ability.

80. At stage two of the IDRP, the medical adviser considered that, given the evidence provided and the length of time to age 65, Dr A would be capable of working in a part-time GP Principal role earning £40,000 a year. When compared to his pre-loss pay of £68,401.75 this equated to a PLOEA of 42%.

81. It did not accept that a different methodology was used by the Scheme's medical adviser at stage two; the medical adviser considered Dr A's earning ability before and after the crystallisation date. The fact that the medical advisers had a different opinion on the role that Dr A was likely to be able to achieve did not mean that either decision was flawed.

Conclusions

82. In considering the analysis within NHS BSA's PIB assessment, I am not satisfied that it has taken into account the broader context of this matter. On 3 February 2016, Dr A's medical advisers deemed him fit to work only 40% of full-time hours. NHS BSA made note of this in its second stage IDRP decision, whereby, it said; "the applicant is returning to work soon and will do so on a basis of 40% employment…When training has been completed, it is accepted that he is likely to continue to work on a part-time basis, which is expected to be of 40% to 60% of normal hours, in order to reduce the risk of relapse of depression." It then said, it would be reasonable to expect that Dr A would earn more than £100,000 pro rata in a GP principal role, so if he worked on a 40% basis, a loss of earning ability of no more than 40% was expected.

83. However, whilst NHS BSA has considered the ramifications of Dr A working at 40% of full-time hours in the future, it has failed to consider the initial challenge, which is that of Dr A completing his GP training.

84. As at 3 February 2016, Dr A was not deemed fit to work more than 40% of full-time hours. On 16 March 2016, HEE stated clearly and unequivocally that it would not support training on a 40% basis for more than 12 months. This poses the question: what would Dr A's prospects be if after 12 months, he remains in a position whereby he is only capable of working 40% of full-time hours?

85. I cannot see that NHS BSA factored in this point. Crucially, if Dr A is not able to complete his GP training on the reduced hours basis he requires, then he will fail to qualify as a GP. I find that it was remiss of NHS BSA to consider the various GP roles Dr A would be likely to undertake (and the salary attached to these), when it was apparent that there were challenges to his completing the training required to achieve these roles. As NHS BSA's assessment failed to consider this specific point, this matter shall be remitted back to it for reconsideration.

86. NHS BSA has said that it was not unreasonable for the Scheme's medical adviser to conclude that in the time up to age 65, Dr A would be able to become a GP Principal, highlighting that the stage two decision was made 11 days after the return to training date suggested by HEE. It says, given Dr A's previous experience, the fact that he had just returned back to training and the medical evidence held, it had no reason to disagree with the medical adviser's recommendation. However, again, there was also the possibility that this would not be the case, but the medical adviser did not consider or include such a scenario in his reasoning, even if only to say that he considered this unlikely. Instead, it is solely assumed that Dr A will complete his training.

87. Dr A has also raised concerns in respect to the methodology applied in establishing his PLOEA. I am not, however, persuaded that NHS BSA has made an error in this regard. Whilst I appreciate that the Regulations do not specify how PLOEA should be calculated, the broad principle is that NHS BSA should establish the applicant's

earning ability before and after the injury (which the application concerns) to arrive at their PLOEA.

88. NHS BSA's process is for a medical adviser to consider the applicant's PLOEA taking into account information gathered on their injury and the basis upon which they can return to work. Essentially, the medical adviser carries out a before and after assessment of what the applicant was earning before the injury, and what they could earn following this.

89. Purely to explain my reasoning on this point of methodology, I will refer to the figures and analysis used by NHS BSA in its assessment, however, it remains the case that I consider the substance of this to be flawed and appropriate for remittal. NHS BSA determined that Dr A was earning £68,401.75 before the injury and even on a 40% of full-time basis, his PLOEA would be expected to be no more than 40% where he would reasonably be expected to earn more than £100,000 in a GP principal role.

90. Dr A's stance is that if before he sustained his psychiatric injury, it was anticipated he would become a full-time GP principal, earning over £100,000 but afterwards, he could only work 40% of full-time hours, his PLOEA should fall into the next band of 50% to 75%. However, although the approach taken by NHS BSA might not be advantageous to Dr A, or others in the same position, undertaking training which when completed would lead to a significant pay increase, there is nothing inherently flawed in the methodology followed by NHS BSA. NHS BSA's methodology follows a logical before and after assessment in line with the overriding objective of the assessment. Therefore, I do not find that NHS BSA has made an administrative error in its approach. If it were reasonable to form the opinion based on the evidence available at the time that Dr A would become a GP Principal, which now needs to be reconsidered on remittal by NHS BSA, then, in my view this methodology is appropriate.

91. Dr A has also raised specific concerns on the figure of £68,401.75 used to assess his PLOEA. He has said that he was 12 months away from becoming a GP Principal, and believes the figure used to establish his earnings ability before the injury should take this into account. I have considered this point on the basis that it was reasonable to form the view that Dr A would become a GP Principal (See paragraph 89 above). NHS BSA has said that the higher figure of, the best of the last three years total pensionable pay and the annual rate of pay, demonstrates Dr A's earning ability prior to the reduction.

92. Regulation 4(1) refers to "earning ability." I do not find that NHS BSA's approach in establishing this figure using the above method, is unreasonable, nor does it amount to an administrative error in respect to not following the Regulations, as these do not stipulate how the assessment of PLOEA should be conducted.

93. Turning now to the number of years' service which should be taken into account in Dr A's PIB calculation, I agree with NHS BSA's interpretation of Regulation 5, which defines "meaning of service". I appreciate that Dr A's terms of employment were

amended by the NHS Trust for whom he worked, in acknowledgement of his non-NHS Service in India, but I deem this to be a separate matter. Essentially, in Regulation 5(b), meaning of service is defined as "any period of employment that would be taken into account for any purpose of a relevant pension scheme." My view is that "relevant pension" can reasonably be interpreted as that providing pension benefits in connection with an NHS employment. Hence, I do not find that NHS BSA has made an administrative error in not taking into account Dr A's non-NHS service.

94. I will now for completeness deal with Dr A's complaint regarding the reduction applied to average remuneration by NHS BSA in its PIB calculation. I am not satisfied that the BMA Agreement, published in 1988 and not updated since, provides NHS BSA with the requisite authority to reduce average remuneration to 87% of its value.

95. However, NHS BSA has applied an average remuneration figure (£122,045) that is higher than the one communicated to Dr A in November 2014, as representing the average remuneration of a general medical practitioner between age 40-44, this being a figure of £93,900. On the basis that NHS BSA could have validly used this lower £93,900 figure instead, which would have been less than the £122,045 figure even with an 87% adjustment applied, I do not consider this to constitute maladministration causing financial injustice to Dr A, in this respect.

96. Lastly, I am concerned by the changing stance of NHS BSA in relation to how it calculated Dr A's PLOEA. On 1 September 2015, NHS BSA informed Dr A that he had been assessed as having a PLOEA of 40% because, prior to his injury, he was earning £68,401.75 and would resume work on a 40% of employment basis, earning £41,042.28 per annum.

97. However, at stage two of the IDRP, following a different medical adviser's assessment, Dr A's PLOEA remained in the band 3 category, but a different methodology was given. This medical adviser noted that Dr A was returning to work on a 40% of full-time basis, and then considered the salary which Dr A would be expected to earn, which was deemed to be a figure of over £100,000. Thereby, to establish Dr A's PLOEA, a figure of £40,000 was compared with the pre-loss figure previously used of £68,401.75. This was a change in approach from NHS BSA's initial assessment.

98. I consider that this would have caused further confusion to Dr A and led him to doubt NHS BSA's approach, which I understand he was already questioning. This would have been further compounded by the fact that NHS BSA arrived at the same PLOEA despite using a different method. I consider that an award is warranted to Dr A for the serious distress and inconvenience caused to him by the use of different methodologies.

99. Therefore, I uphold Dr A's complaint in part.

Directions

100. To put matters right, within 28 days of the date of this Determination, NHS BSA shall reconsider Dr A's PIB application, taking into account the challenges presented to the completion of his GP training, then communicate its decision in writing to Dr A within 21 days of it being made.

101. Should NHS BSA determine that a higher PIB award should have been paid to Dr A from the date it was put into payment, it will pay him the difference between what he was paid at that time, and his newly determined award for that period, as a lump sum, plus interest. The interest referred to shall be calculated at the base rate for the time being quoted by the Bank of England.

102. Within 14 days of the date of this determination, NHS BSA shall pay Dr A £1,000 for the serious distress and inconvenience caused to him by its changing position on the calculation of his PLOEA and in its failure to assess his PIB application correctly.

Anthony Arter

Pensions Ombudsman
23 December 2019

Appendix

The National Health Service (Injury Benefits) Regulations 1995

Regulation 4(4)

Where a person to whom regulation 3(1) applies suffers a reduction in the emoluments of an employment mentioned in that regulation before 31st March 2018 by reason of the injury or disease, there shall be payable, from the date of that reduction, an annual allowance—

(a) of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6), will provide an income of the percentage of his average remuneration shown in whichever column of the table in paragraph (2) is appropriate to his service in relation to the degree by which his earning ability is reduced at the date that his emoluments were reduced; or

(b) of the amount, if any, which, when added to the value, expressed as an annual amount, of any pension specified in paragraph (6)(a), will provide an income at the annual rate at which a pension would have been payable to the person under his relevant pension scheme if, on the day before such reduction, he had ceased to be employed and was incapable of discharging efficiently the duties of his employment by reason of permanent ill-health or infirmity of mind or body;

whichever is the greater:

Provided that regulation 13(4) shall apply to that allowance as if the person had ceased to be employed on the day before his emoluments were reduced and had been re-employed on the following day with the reduced emoluments.

Regulation 5

Meaning of service

A person's service shall comprise all of the periods which at the date on which he ceased to hold an employment or appointment mentioned in regulation 3(1), or on which the emoluments of such employment or appointment were reduced, as the case may be, fell within any of the following descriptions, but no period shall be taken into account under more than one description—

(a) any period during which he held such employment or appointment;

(b) any period of employment that would be taken into account for any purpose of a relevant pension scheme;

and

(c) any other period that the Secretary of State may approve in any particular case.