

## Ombudsman's Determination

Applicant	Mr N
Scheme	NHS Injury Benefit Scheme ( <b>the Scheme</b> )
Respondent	NHS Business Service Authority ( <b>NHSBSA</b> )

## Outcome

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

## Complaint summary

3. Mr N disagrees with the decision made by NHSBSA in November 2014 that his Permanent Injury Benefit (**PIB**) is only payable from 19 August 2013. In his view, it should be backdated to his last day of NHS employment on 12 January 2005.

## Background information, including submissions from the parties

4. Mr N suffers from chronic severe depression and anxiety caused by work related stress. He had been on long term sick leave since 2003 prior to retiring on the grounds of ill health in February 2005. He says that he also developed symptoms of Post-Traumatic Stress Disorder (**PTSD**) shortly after retiring but was unable to find a medical expert to formally diagnose this condition until 2013.
5. In June 2005, Mr N applied for PIB from the Scheme.
6. Regulation 4(1) of the NHS Injury Benefits Scheme Regulations 1995 (as amended) (**the Scheme Regulations**) provides that in order for a PIB award to be payable the claimant must have suffered a permanent loss of earnings ability (**PLOEA**) of over 10%; permanent in this context means to age 65.
7. In December 2005, NHSBSA informed Mr N that:
  - it had accepted that his claimed injury of anxiety and depression was wholly or mainly attributable to events that happened whilst he was carrying out his duties of his NHS employment; but

- it agreed with its Medical Adviser's (**MA**) findings that there was no evidence to show that his condition would not improve to enable him to return to an alternative role at a similar grade to his previous post prior to age 65
8. In March 2006, Mr N appealed NHSBSA's decision without submitting any new medical evidence. NHSBSA rejected his appeal in April 2006 because there was no evidence at that time of a PLOEA of over 10% when considering the period from 12 January 2005 to age 65. It informed him that he could appeal twice more and recommended that he present new medical evidence in support of his claim.
  9. Mr N made his second appeal under Stage One of the Scheme's Internal Dispute Resolution Procedure (**IDRP**) in February 2008, again without providing any new medical evidence. NHSBSA declined it in March 2008 and informed Mr N that he had six months only to make his final appeal.
  10. Mr N appealed the decision for the third time in November 2013 after having obtained new medical evidence in order to do so.
  11. NHSBSA informed Mr N that it could not consider his appeal under Stage Two IDRP because he had missed the six month deadline and waiting five years before making his final appeal was unreasonable.
  12. In accordance with clause 13 of the Scheme Regulations (as shown in the Appendix below), NHSBSA treated Mr N's appeal as a "deterioration review". By doing so, NHSBSA could then take into account the new medical evidence submitted by Mr N which included a diagnosis of PTSD for the first time when making its decision.
  13. NHSBSA postponed the deterioration review until after receiving further medical evidence including a report dated 27 October 2014 commissioned by it from a consultant psychiatrist, Dr Vincenti who said:

"He (Mr N) is hoping for a diagnosis of PTSD because this will back up his claim for an injury award to supplement his income, which has suffered considerably due to enforced early retirement on the grounds of mental ill health. He certainly presents with many of the symptoms consistent with PTSD...

However the situation is far from straightforward...there is a huge overlap between the symptoms of depression and those of PTSD...

Whilst I am sure that Mr N does complain of symptoms which can be associated with PTSD and whilst I am equally sure that he will have found his experiences at Rampton Hospital to be incredibly distressing and upsetting, I would doubt that his difficulties there ever met the necessary level of "threat" upon which to base a formal diagnosis of PTSD...

Clinicians of all disciplines...know well that adverse life events of any sort and severity can and do trigger persistent and profound depressive illnesses and in my view that is what has happened with Mr N...

In summary, I am not of the view that we can make a diagnosis of PTSD in Mr N's case, but I am of the view that he suffers from chronic persistent depression, and that this can and should be directly attributed to his experiences at work in Rampton...I think therefore a strong argument can be made that his mental disorder has arisen as a consequence of a psychiatric injury sustained at work in the form of overwhelming work related stress. He does need to have more treatment...Such treatment, even if it can be delivered, is unlikely to prove curative and unlikely on the balance of probabilities to ever return Mr N to paid employment of any sort..."

14. In November 2014, NHSBSA informed Mr N that:

- it had accepted the view of its MA that he suffered an injury which was wholly or mainly attributable to the duties of his NHS employment and;
- he had been assessed as having a PLOEA of the maximum 76% or more (Band 5)

15. The MA's "concluding advice" to NHSBSA was:

"It is advised that a Band 5 award is appropriate. His symptoms appear to have been present for many years, there is no clear evidence of any gradual or sudden deterioration in them, rather he thought that as he had been awarded Industrial Injury benefit for PTSD he thought that would help him to be awarded injury benefit and indeed agreed to see a psychiatrist as he wished this diagnosis to be formally confirmed."

16. NHSBSA also informed Mr N that, according to the Scheme Regulations, it could only backdate his PIB up to a maximum of 13 weeks before the date upon which it received notification of his claim of a further reduction in PLOEA. It could not therefore agree to his request to pay PIB from 12 January 2005. As Mr N made his request for a "deterioration review" on 18 November 2013, NHSBSA therefore could only pay his PIB from 19 August 2013.

17. Mr N appealed this decision under the Scheme's IDRP in October 2016. His appeal was unsuccessful at both stages in December 2016 and April 2017 respectively.

18. Mr N says that:

"The system is fatally flawed. How on earth some NHS Pensions office worker could say with total confidence that Mr N will get better in 2005, 2006 and in 2008 is beyond me. I had no psychiatric assessment to inform them of my mental state, they merely guessed. It is infantile, and has been proved to be ridiculous..."

...my GP tried for years to get me psychiatric help/opinion from outside my local area, but to no avail, as none was available. I did not want to see a local psychiatrist, because they and their staff had the same bosses/Trust that I worked for. They were the people who made me ill in the first place.

I certainly do feel that cases of mental illness are so complex and profoundly difficult to predict or treat, that these Regulations need to encompass these difficulties, especially time, for evidence/progress/lack of progress to be elicited. To not do this is highly discriminatory...physical illnesses are easy to predict and follow, mental illnesses are certainly not."

## **Adjudicator's Opinion**

19. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHSBSA. The Adjudicator's findings are summarised briefly below:-
- NHSBSA clearly informed Mr N in March 2008 that he only had six months to make his Stage Two IDRP. It is regrettable that Mr N was unable to obtain the additional medical evidence required to make his final appeal before this deadline expired.
  - NHSBSA is entitled, however, to formulate its own IDRP and expect a complainant to comply with its specified timescales for making an appeal under IDRP. There was consequently no maladministration on the part of NHSBSA for refusing to treat Mr N's third appeal under Stage Two IDRP.
  - If Mr N's condition deteriorates in an unexpected way, clause 13 (1A) 2 of the Scheme Regulations specifies that he has the right to have his case assessed by NHSBSA as a deterioration review.
  - It also stipulates that if the outcome of a review is successful, NHSBSA could only backdate Mr N's PIB no more than 13 weeks prior to the date upon which he requested the review and does not allow NHSBSA the discretion to backdate payment further to 12 January 2005 as Mr N would like.
20. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr N for completeness.

## **Ombudsman's decision**

21. In accordance with section 50 of the Pensions Act 1995, NHSBSA must ensure that it has a procedure in place to enable any person with an interest in the Scheme to make an application to it for a decision on a matter in dispute.

22. The law allows NHSBSA to operate a two stage IDRPs but, in the main, does not prescribe the detail of the IDRPs. That is for NHSBSA to decide.
23. According to section 50 B (3) of the Pensions Act 1995 and the Pensions Regulator's Code of Practice No 11 "Dispute Resolution – Reasonable Periods" (**the Code of Practice**), the specified reasonable period within which an application from certain persons with an interest in the Scheme must be made is the end of the period of six months beginning immediately after the date on which he ceased to be, or claims he ceased to be, a person with an interest in the Scheme.
24. The Code of Practice also states that NHSBSA may include in its IDRPs a reasonable time limit of its choosing within which applications for the resolution of a dispute should normally be made by members of the Scheme such as Mr N.
25. In my opinion, NHSBSA was consequently entitled to specify that six months was a reasonable period within which Mr N had to make his final appeal under IDRPs..
26. According to the Code of Practice, NHSBSA may agree to accept a request for a review outside the specified reasonable period for exceptional reasons such as incapacity. I am satisfied that NHSBSA did consider whether to treat the 2013 application as IDRPs out of time. It said in its letter of 11 July 2017:

'if a third appeal had been allowed to be considered in 2013, only the evidence contemporaneous to the claimed condition brought at the date of application in 2005 could be considered; therefore fresh evidence from 2013 that is in relation to a fresh diagnosis of PTSD would not have been able to have been considered under the rules of the Scheme. It was decided by the NHS BSA that a deterioration review was the only way forward with this application, and that it was most beneficial to Mr N because [it allowed] the fresh diagnosis of PTSD to be considered.'
27. In the event, a subsequent medical report reaffirmed the original diagnosis of depression, but was able to put a different prognosis on the condition because it had become so longstanding. However NHSBSA made the decision whether to accept the appeal out of time before that report was available, and on the basis that Mr N had obtained a later diagnosis of PTSD. I cannot fault its reasoning presented with the application as it stood in 2013.
28. I also cannot fault the conclusion that it came to once it had decided that it needed to conduct a deterioration review. If Mr N's condition deteriorates in an unexpected way, clause 13 (1A) 2 of the Scheme Regulations specifies that he has the right to have his case assessed by NHSBSA as a deterioration review. It also stipulates that if the outcome of a review is successful, NHSBSA could only backdate Mr N's PIB no more than 13 weeks prior to the date upon which he requested the review and does not allow NHSBSA the discretion to backdate payment further to 12 January 2005 as Mr N would like.

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29. Needless to say, NHSBSA's decision would appear disappointing and unfair to Mr N but it does have a duty to pay benefits in accordance with Scheme Regulations and I believe that this is what has happened. I should add for completeness, that I have no power to override the Regulations.
30. Although I fully sympathise with Mr N's circumstances, it is therefore my opinion that Mr N's complaint cannot be upheld.

**Karen Johnston**

Deputy Pensions Ombudsman  
26 October 2017

## **Appendix**

### **Legislation – deterioration reviews**

Regulation 13 (1A) 2 provides

“A person not entitled to benefits under these Regulations by reason only that his earning ability was not permanently reduced by more than 10 per cent shall be entitled to receive such benefits if, in consequence of a further reduction by reason of that injury or disease his earning ability is permanently reduced in aggregate by more than 10%, except that such benefits shall not be payable in respect of any period before such further reduction or for a period of more than 13 weeks before the Secretary of State is notified in writing of such further reduction, whichever is the later.”