

Ombudsman's Determination

Applicant	Mrs L
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Mrs L'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. Mrs L is unhappy because NHS BSA has declined her application for Permanent Injury Benefit (**PIB**), which she believes she is entitled to under the Scheme.
4. NHS BSA is satisfied that Mrs L sustained her injury during the course of her employment, thereby meeting the first criteria for PIB. However, NHS BSA says Mrs L does not meet the second criteria, as she cannot evidence Permanent Loss of Earning Ability (**PLOEA**).

Background information, including submissions from the parties

5. Mrs L was a Band 5 Theatre Practitioner, and a member of the Scheme for a number of years, before she went on sick leave in September 2014.
6. In December 2014, Mrs L underwent patch tests and it subsequently came to light she had severe skin allergies. In particular, her condition had been aggravated by wearing theatre gloves as part of her role at work.
7. An alternative role on the same banding was found for Mrs L in Outpatients. However, Mrs L says she was unable to accept the role as her skin had not recovered and she was unfit for work at the time.
8. On 17 February 2015, Occupational Health (OH) physician Dr Gemmell advised that Mrs L was unfit for theatre work, as well as 99% of clinical work. In March 2015, Mrs L's employment in her role as a Theatre Practitioner ceased and she applied for PIB.

9. On 28 September 2015, NHS BSA confirmed that Mrs L's PIB application had been declined. It acknowledged that her injury had arisen during the course of her employment, but it was not satisfied she had suffered PLOEA as required by the relevant regulations. In particular, NHS Injury Benefit Regulations 1995 (as amended) (**the Regulations**) state that a Scheme member must have suffered PLOEA in excess of 10%, in order to be eligible for PIB.
10. In assessing whether Mrs L had suffered PLOEA, NHS BSA confirmed it had taken into account her age, physical and mental ability, academic qualifications, training and experience. It also provided the comments it had received from the Scheme Medical Adviser (**SMA**) in support of its decision.
11. From the comments provided, NHS BSA evidenced that the SMA had considered whether Mrs L would be able to undertake suitable, alternative employment before normal retirement age which would allow her to earn a similar salary as in her previous role. The SMA was satisfied that this was the case, and highlighted the following as recommended options: infection control nurse, outpatient nurse; out of hours emergency care nurse (undertaking phone triage); pre-admission assessment nurse; and disability assessment nurse.
12. On 21 October 2015, Mrs L appealed the decision to decline her PIB application. As part of her appeal, she highlighted that she had been offered a new role in Outpatients in December 2014, but that she had been unable to take this due to her condition at the time and no other roles had been made available since. She also said she had applied, and been declined for, a role similar to those recommended as suitable alternative employment. In particular, she had been unable to secure work as a multiple sclerosis support nurse.
13. On 11 December 2015, NHS BSA confirmed that Mrs L's appeal had been considered and declined under the first stage of its Internal Dispute Resolution Process (**IDRP**). NHS BSA explained that, as part of this, it requested further comments from a second SMA who agreed Mrs L had suffered PLOEA.
14. The second SMA noted that Mrs L had been unable to start the role in Outpatients in December 2014, but believed redeployment in a number of non-clinical roles was possible – particularly if Mrs L continued with the skin treatment and protective measures she was currently using. NHS BSA also highlighted that the "permanent" element of PLOEA meant until age 65. Based on both SMAs' comments, NHS BSA was not satisfied Mrs L had suffered PLOEA.
15. On 27 January 2016, Mrs L appealed the IDRP stage one decision. As part of her appeal, she highlighted Dr Gemmell's report which said she was unable to carry out 99% of clinical work and said she had only been able to secure unskilled, temporary, casual work since leaving her role as a Theatre Practitioner.

16. On 23 May 2016, NHS BSA confirmed that Mrs L's appeal had been considered and declined under its second and final stage of IDRP. NHS BSA confirmed that this was again on the basis that the PLOEA criteria was not satisfied.
17. NHS BSA confirmed that, when assessing PLOEA, it had requested a third SMA to consider her case. The third SMA had considered Mrs L's condition, age, intellectual and academic ability, qualifications and experience. The third SMA noted that Mrs L had said her skin was currently recovered, as she had been able to avoid products that cause an allergic reaction and aggravate her condition.
18. It was acknowledged that Mrs L was unable to undertake clinical work, but the SMA noted there were a number of non-clinical roles she would be able to undertake which would achieve the same salary for her. The SMA also stated that, if Mrs L needed to undertake training, she would have time to do this and undertake the alternative roles before age 65.
19. NHS BSA confirmed that availability of the recommended alternative roles had not been taken into account, as it was not required to by the Regulations. In other words, it confirmed that whether the recommended alternative roles were available would not affect the outcome of Mrs L's PIB application.
20. Mrs L remained unhappy and escalated her complaint to our Office.

Adjudicator's Opinion

21. Mrs L'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:-
 - Our Office's role is not to be a medical expert in such matters, nor to substitute its own decision about Mrs L's PIB application in lieu of NHS BSA's decision. Instead, this Office's role is to consider NHS BSA's decision-making process. In order to do this, the Adjudicator considered whether NHS BSA had:
 - acted in accordance with the relevant regulations;
 - asked the right questions and obtained relevant information; and
 - not reached a decision which is perverse (i.e. a decision at which no reasonable decision maker would arrive).
 - The Adjudicator found that NHS BSA had satisfied all of the above. In particular, she noted that NHS BSA had appointed a new SMA at each stage of the IDRP, and ensured that all specific comments raised by Mrs L were considered. Each SMA then confirmed that the alternative jobs roles suggested broadly matched Mrs L's previous salary, qualifications and experience – and would be suitable even given her skin condition.

- The Adjudicator appreciated that many of the roles suggested may not be available. However, she highlighted that the Regulations do not require availability of alternative work to be considered as part of a PIB application.
 - Finally, the Adjudicator noted that the multiple sclerosis support nurse role Mrs L had been unable to obtain was not an alternative role recommended by the SMA. In relation to the other roles recommended, the Adjudicator did not believe there was sufficient evidence to show they were not suitable alternatives.
22. Mrs L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs L provided her further comments and, in particular, she outlined why each of the recommended alternative roles was unsuitable. Mrs L's reasons included her saying that she did not have the necessary skills or qualifications for the roles.
23. Mrs L's further comments do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs L for completeness.

Ombudsman's decision

24. I sympathise with Mrs L, as it is clear her previous employment came to an end through no fault of her own. However, I can only consider NHS BSA's decision-making process in relation to her PIB application and I am satisfied that NHS BSA has not acted in maladministration.
25. NHS BSA requested independent advice from three separate SMAs as part of considering Mrs L's initial PIB application and appeals. It is clear that NHS BSA considered Mrs L's application in accordance with the relevant regulations, and it also obtained comment from the SMAs in relation to the specific points raised by Mrs L. By doing this, NHS BSA has demonstrated that all relevant facts have been considered, and all relevant questions asked.
26. The SMAs have then provided reasonable responses to Mrs L's points, and affirmed that there are suitable alternative roles for her, in spite of her condition. As such, I do not believe NHS BSA's decision to decline Mrs L's PIB application was perverse.
27. I acknowledge that Mrs L has said she does not have the necessary skills or training for the alternative roles recommended. However, I also note that the third SMA said Mrs L would have time to complete any training required, in order to undertake the roles recommended.
28. I understand that the recommended alternative roles cited by the SMAs are not an exhaustive list. However, even if they were, I do not believe there is sufficient evidence to support Mrs L's assertion that none of the alternative roles are suitable for her.

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29. I consider it likely that Mrs L wants to work in a role suited to her skills and experience again, and I acknowledge that there may not be such a role available at present. However, NHS BSA is not required to consider availability of suitable alternative roles, when deciding whether it is appropriate to award PIB. As such, I cannot recommend NHS BSA award PIB based on the fact Mrs L has so far been unable to obtain a suitable alternative role.
30. I wish Mrs L every success in finding suitable employment in the future, but I do not uphold her complaint.

Anthony Arter

Pensions Ombudsman
21 December 2017