PO-15943

Ombudsman's Determination

Applicant	Mrs Y
Scheme	NHS Injury Benefit Scheme (**the Scheme**)
Respondent	NHS Business Services Authority (**NHSBSA**)

Outcome

1. I do not uphold Mrs Y'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. Mrs Y complains that NHSBSA, the manager of the Scheme, has wrongly declined her application for permanent injury benefits (**PIB**) on the grounds that the injuries to her back and neck were not wholly or mainly attributable to her NHS employment.

Background information, including submissions from the parties

4. Regulation 3(2) of the National Health Service (Injury Benefits) Regulations 1995 (as amended) (**the Scheme Regulations**), provides for the payment of a PIB where the individual had sustained an injury (or contracted a disease) which was "wholly or mainly attributable to his/her employment".

5. In accordance with Regulation 4(1) of the Scheme Regulations, NHSBSA is then required to consider the second criterion; whether the applicant has suffered a permanent loss of earning ability (**PLOEA**) of more than 10%. Permanent means to age 65. It has now been clarified that in order to answer this question, NHSBSA needs to determine whether the reported injury has been an operative cause of any PLOEA suffered.

6. On 2 July 2012, Mrs Y says that she felt instant pain and discomfort in her lower back while rolling an obese patient. She thought that she had suffered muscle strain and took some painkillers at home in the evening.

7. On the following day, Mrs Y says that the same patient forcibly pushed down on her shoulders after accidentally stumbling and this caused her to twist her back and fall to

her knees. As a result of this second incident, she states that she experienced severe pain to "her shoulder, neck, middle thoracic, right groin and lumbar section".

8. Mrs Y contends that:

    - her back and neck pain has persisted despite receiving various treatments including several strong painkillers for it;
    - she now suffers from right arm pain, pins and needles and muscle weakness;
    - as a consequence of her symptoms; (a) she can no longer sit for long periods; (b) she has poor function of her arm and cannot sleep comfortably; and (c) she has developed psychological problems and took an overdose of medications in December 2012; and
    - the incidents have severely impacted on every aspect of her life

9. After the NHS ended her employment in August 2013, Mrs Y applied for PIB. NHSBSA rejected her application in October 2013 because, after carefully considering all the available evidence, it agreed with its Scheme Medical Adviser's (**SMA**) view that:

    - Mrs Y had suffered an injury that was wholly or mainly attributable to the duties of her NHS employment; but
    - as a result of that injury, she had been assessed as having suffered no PLOEA which meant that no PIB would be payable

    Relevant sections of NHSBSA's decision letter may be found in the Appendix.

10. Mrs Y was unhappy with this decision and asked for her PIB claim to be reviewed under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).

11. NHSBSA did not uphold Mrs Y's appeal at both stages of the IDRP, in April 2015, and June 2017.

12. At Stage One IDRP, the SMA concluded that:

    - the likely cause of Mrs Y's symptoms following the incidents in July was a soft tissue injury to her neck and back which was wholly or mainly attributable to her NHS employment; but
    - the available evidence did not demonstrate that the incapacitating effects of this attributable condition were permanent

13. At Stage Two IDRP, after reviewing all the available medical evidence, a different SMA concluded that Mrs Y's back and neck injuries were not wholly or mainly attributable to her NHS employment. In the opinion of the SMA:

    - Mrs Y was suffering from spondylosis affecting her neck and the lumbar spine that had not been contracted during her NHS employment;

- there was evidence that Mrs Y had back pain symptoms preceding her employment by over a decade which are considered likely to have arisen from her spondylosis;
- the low back and subsequent neck pain which Mrs Y felt after the incidents in July 2012 can be attributable to her spondylosis;
- the evidence showed that Mrs Y had a pre-existing degenerative disease from which she was suffering intermittent pain over a period of at least six months prior to July 2012, that was aggravated following the two "minor" events at work which were not the cause of her condition;
- her NHS employment did not contribute to the degenerative disease of her spine; and
- her psychological condition arising from the events of July 2012, was also not wholly or mainly attributable to her NHS employment

14. Further details of the IDRP Stage One and Two decision letters may be found in the Appendix.

15. Mrs Y says that:

- she submitted to NHSBSA numerous medical reports on the condition caused by the two incidents in July 2012, and the psychological impact it had on her;

- NHSBSA has not looked at these medical reports properly or impartially and made its decision without medically examining her;

- it has only taken the negative points from the medical reports to reinforce its decision to reject her PIB application;

- in particular, she considers that NHSBSA's dismissal of the conclusions shown in the medical reports submitted to the court by Dr Theodossiadis, Consultant Psychiatrist , and Dr Lieberman, Consultant in Pain Medicine and Anaesthesia in 2016, to be "alarming" and asks that they are recognised in their entirety;

- in his report, Dr Lieberman concluded that as a consequence of the injuries:

    a) she suffered severe back pain which turned quite rapidly into a chronic pain condition that prevented her from working by January 2013 and led to her dismissal;
    b) she developed symptoms of anxiety and depression and also pain related behaviours which are signs of psychosocial distress following the incidents and loss of her job; but
    c) he would, however, defer to the expert opinion of a Consultant Psychiatrist with regard to the extent of her depressive and mental health issues;

- Dr Lieberman also said that:

    a) in his opinion, she suffered from chronic myofascial pain syndrome affecting her lumbar spine (predominately work related injuries) and neck (predominately RTA related);
    b) her neck pain could also be described as a whiplash associated disorder type 2; and
    c) she was unlikely, on the balance of probabilities, to ever work again as a consequence of the accidents and would only be able to carry out on a part time basis light clerical work if she had a very good outcome from participating in a pain management program.

- in his report, Dr Theodossiadis concluded that:

    a) her mental health was badly affected by the two accidents in July 2012 and the RTA in October 2013;
    b) she is suffering from severe recurrent psychological symptoms but if she receives the treatment he has recommended immediately, she will probably improve substantially;
    c) it is unlikely that she will recover fully because the prognosis of her chronic pain syndrome is poor and her vulnerability to future episodes of depression is therefore increased;
    d) the pharmacological management of her severe chronic pain should be reviewed by a Consultant in Pain Management without delay;
    e) after taking into account the findings in the reports of Mr Mohammad and Dr Lieberman, he considers that, on the balance of probabilities, the accidents on 2 July 2012, 3 July 2012 and 24 October 2013 contributed 5%,70%, and 25% respectively to her condition;
    f) her capacity for work has been severely compromised due to the presence of severe psychological symptoms following the incidents in July 2012;
    g) her opportunities in the open market will probably be severely limited in the long term; and
    h) he agrees with Dr Lieberman's view that she will only be able to perform light clerical work on a part time basis once she has substantially improved, probably in three to four years' time.

- the medical evidence does not support diagnoses of muscular pain or a soft tissue injury following the accidents in July 2012;

- in particular:

    a) she was prescribed opiate painkillers and anti-inflammatories by her GP much stronger than appropriate for soft tissue injuries;

b) she could not move or handle patients again until December 2012;
c) she saw a physiotherapist who thought that she suffered from “spinal cord compression”;
d) in October 2012, her GP referred her to a muscle skeletal clinic;
e) she paid to see Mr Khatri, Spinal Surgeon, privately who diagnosed that she suffered from “possible double crush phenomenon”;
f) an MRI scan of her cervical and lumbar spine, in November 2012; showed that she had four slipped, herniated or bulging discs in her spine and also a trapped nerve;
g) Mr Khatri suggested an option of surgically removing three of the discs which she declined;
h) a nerve conduction study confirmed that the nerves to her arm had been damaged beyond repair;
i) she successfully applied for temporary injury allowance;
j) her employment was terminated in August 2013 because the NHS could not find her a suitable position which accommodated for the symptoms of her condition;
k) she saw Dr Johnson, Pain Consultant, privately who diagnosed that she suffered from Complex Regional Pain Syndrome, a chronic pain condition, as a result of the injuries; and

- she returned to work as quickly as possible after the injury because she had received “a cautionary sickness absent meeting letter” which made her feel that she could not take time off sick no matter how much pain she was in.

16. She also says that:

> “I dispute that I had been suffering ongoing back problems preceding my employment. When looking into my medical files, GP records and work sickness absence…I had not had any sickness absence for back related issues even though I worked on a heavy ward and did moving of handling of heavy patients on a day to day basis. I had not received any ongoing or continual pain relieve from my GP or been on sickness absence from work with back related problems.
>
> Since the day of the second injury I have received ongoing medications and support from my GP and other agencies for pain relief.
>
> I received also annular tears to my lower back and a slipped disk to my C8 pressing on my nerve root, causing myself to lose feeling in my hand. I had no complaints about my neck or pain in my arm for the years preceding my accidents at work...
>
> Unfortunately back pain is a common health problem therefore it takes time to be diagnosed…it was too late and the damage was lifelong. I tried to stay at work as I loved my job…I work hard along with excruciating pain to continue my vocation as a nurse…Unfortunately this was to no avail and my injuries

and pain prohibited myself from continuing to work. As shown by my occupational health records, I do consider if these accidents had not occurred I would still be happily working as a nurse."

Adjudicator's Opinion

17. Mrs Y'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:-

- It was clear from the available evidence that NHSBSA had taken some time to consider Mrs Y's case. It had access to her medical records and its decision was based on a review of all the then available relevant evidence. There was no evidence that NHSBSA took any irrelevant matters into account when making its decision or that anything of relevance was overlooked. Furthermore there was nothing to suggest that the Scheme Regulations have not been interpreted correctly or that NHSBSA failed to ask the right questions when assessing Mrs Y's eligibility in order to make its original and Stage One IDRP decisions.

- For the purposes of measuring whether the injury is 'attributable', NHSBSA rightly uses the civil standard of proof (the balance of probabilities) to assess whether the cause of an illness or injury is attributable to a person's work.

- The fact that Mrs Y had subsequently provided further medical evidence showing that she was still suffering from the same condition did not impact upon the validity of the original decision. NHSBSA was only expected to make its decision on the basis of information available to it at the time. But there was nothing improper in taking account of later medical evidence when reviewing a decision in so far as it bore on what Mrs Y's condition was at the time when the original decision was made. Caution needed to be taken however in revisiting earlier decisions made on the basis of contemporary material at the time of reconsideration. This was exactly what NHSBSA did at Stage One IDRP.

- The Adjudicator was not, however, entirely convinced that NHSBSA at Stage Two IDRP asked the right question. Strictly, the question was whether Mrs Y suffered an injury which was wholly or mainly attributable to her NHS duties. It was not whether her spondylosis was wholly or mainly caused by her NHS duties, which was what NHSBSA seem to have asked themselves.

- In the original decision and also the Stage One IDRP decision, NHSBSA concluded that Mrs Y had suffered injuries which were wholly or mainly attributable to her NHS duties that had not resulted in a PLOEA. In the Adjudicator's opinion, this was probably a more accurate description of Mrs Y's circumstances.

- Mrs Y suffered soft tissue injuries in July 2013, which did not cause her to stop work and which probably had resolved by the time her employment ceased. These

would not have resulted in a PLOEA. Her spondylosis itself was not attributable to her NHS duties.

- The question NHSBSA should have asked at Stage Two IDRP, was to what extent the July 2013 injuries had contributed to her PLOEA? It was, however, open to NHSBSA to conclude that there was no contribution. In other words, the injuries were not operative causes for her PLOEA. The available medical evidence, in the Adjudicator's opinion, would appear to support such a conclusion.

- Although the failure by NHSBSA to ask the right question at Stage Two IDRP constituted maladministration on its part, the outcome was unlikely to change if it was to be asked to review Mrs Y's case for the reasons the Adjudicator has given above.

18. Mrs Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs Y provided her 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 Mrs Y for completeness.

Ombudsman's decision

19. Regulation 3(2) of the Scheme Regulations applies where an injury sustained or a disease contracted is wholly or mainly attributable to NHS employment. Determining whether this is so is a question of fact for NHSBSA. In reaching the decision, NHSBSA must take into account all relevant but no irrelevant factors.

20. It is not my role to agree or disagree with the medical opinions formed by the medical professionals and come to a decision as to Mrs Y's eligibility for payment of PIB benefits under the Scheme. I am primarily concerned with the decision making process. Medical (and other) evidence is reviewed in order to determine whether it supported the decision made. The issues considered include: whether the relevant rules have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence However, the weight which is attached to any of the evidence is for NHSBSA to decide (including giving some of it little or no weight). It is open to NHSBSA to prefer evidence from its own advisers; unless there is a cogent reason why it should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser, neither of which, in my view, has occurred in this case.

21. A difference of medical opinions amongst the medical experts consulted at the various stages of Mrs Y's application on the prognosis of her illness would not be sufficient to warrant NHSBSA setting aside the advice it received from its own advisers. There is a difference between ignoring an opinion and not accepting it after due consideration. I do not find that NHSBSA have ignored the medical opinions provided by Dr Lieberman, Dr Theodossiadis and the other medical experts

supporting Mrs Y's PIB application, rather it has decided to accept the advice of its own medical advisers. NHSBSA may reasonably prefer one medical view over the other. Moreover it is entitled to give more weight to its own medical adviser's opinion.

22. I may only consider whether the final decision reached by NHSBSA was properly made and not one which no reasonable decision maker faced with the same evidence would reach. I cannot determine that NHSBSA should reconsider its decision merely because I might have acted differently. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted for NHSBSA to reconsider.

23. I concur with the Adjudicator, however, that the failure by NHSBSA to ask the right question at Stage Two IDRP did constitute maladministration on its part, but the outcome is unlikely to change if it NHSBSA was asked to review Mrs Y's case.

24. Whilst I fully appreciate that Mrs Y believes that the medical advice she has obtained has not been properly taken into account, NHSBSA was entitled to rely on the medical opinion of its own medical advisers and I see no justifiable grounds for me to disagree with NHSBSA's decision not to grant her PIB from the Scheme after having considered all the relevant facts.

25. So I do not find that there has been maladministration in the way NHSBSA reached its decision on Mrs Y's PIB application.

26. Therefore, I do not uphold Mrs Y's complaint.

Anthony Arter

Pensions Ombudsman
28 February 2018

APPENDIX

The “Summary” section of NHSBSA’s decision letter said that:

> “Back pain: On balance it is considered that this applicant had transient back pain at work on 02/07/12 but this was not sufficient for her to stop work, nor seek medical attention at the time.
>
> The following day a heavy patient leaned on her shoulders. She did not stop work, nor did she seek medical attention.
>
> She did report severe back pain on 05/07/12. This was diagnosed as muscular pain. She had intermittent absences from work for back pain, but her work was modified. It is considered that temporary symptoms of muscle strain in her lower back arose during the course of her NHS employment (both claimed incidents).
>
> The relevant pain is considered to have lasted for up to 6 weeks and to have incapacitated her for her work for the absences in July 2012 only.
>
> It is considered that her subsequent low back pain, thoracic pain and buttock/leg pain are not wholly or mainly attributable to the duties of the NHS employment. These are wholly or mainly attributable to the “black” discs on MRI scan which represent pre-existing degenerative change. This degenerative change is constitutional and not wholly or mainly attributable to the duties of the NHS employment.
>
> Neck and upper limb symptoms: She did not report neck, shoulder, arm or hand symptoms until 31/08/12 (GP) and 05/09/12 (OH). There is no close temporal link between these symptoms and the claimed incidents. These symptoms are not considered to be wholly or mainly attributable to the duties of the NHS employment.
>
> Psychological symptoms and overdose: These symptoms are not considered to be wholly or mainly attributable to the duties of the NHS employment, nor to any injury/disease that is itself, wholly or mainly attributable to the duties of the NHS employment.
>
> It is my opinion that, on the balance of probabilities, the evidence in this case confirms that temporary (up to 6 weeks duration) low back muscle strain was contracted in the course of the person’s NHS employment and is wholly or mainly attributable to that NHS employment.
>
> It is my opinion that on the balance of probabilities, the evidence in this case does not confirm the incapacitating effects of the accepted condition are permanent.
>
> Therefore there is no relevant PLOEA.”

In its Stage One IDRP decision letter dated 9 April 2015, NHSBSA said that:

> "She was initially seen by the Consultant Spinal Surgeon, Mr Khatri, in October 2012, and underwent MRI scan of her cervical and lumbar spine which showed small disc on right C7/T1 area and 2 black degenerate discs at L3/4 and L4/5 with high intensity zone. Mr Khatri advised that there were no clear surgical targets and referred her to the Pain Management Consultant. Mrs Y had nerve conduction studies that excluded any focal entrapment of median or ulnar nerve. She attended Dr Johnson, Consultant in Pain Management…When seen by Dr Johnson in January 2014 it was noted that she was making some reasonable progress with Pain Management Service however she was involved in a RTA in October 2013 which resulted in significant flare up of her long term pain as well as some new symptoms…
>
> Dr Johnson reviewed her in October 2014 and at that time noticed that she is starting to increase her physical activity…It is noted that she was unable to tolerate intensive Pain Management course…which was stopped…
>
> When examined by…Mr Khatri on 10 March 2015, she reported significant low back pain…and significant neck pain…Mr Khatri indicates that her recent MRI scan of her lumbar spine has shown disc degeneration at L4/5 and L5/S1 levels with no significant nerve root compromise, which remains essentially unchanged since her last investigation.
>
> According to Mr Khatri, the type of degenerative changes that have been seen on MR scan are seen often in people of the applicant's age. A significant proportion of them would suffer from manageable neck and back pain and the natural history tends to be that of flare ups and remissions. There is poor correlation between MR scan findings and clinical symptoms. It is possible for people to be symptoms free despite these changes on the MR scan. It is likely that these degenerative changes have been present before the index accident.
>
> Mr Khatri is of the opinion that taking into consideration the mechanism of injury it is likely that the accident has resulted into the precipitation of the claimant's symptoms. However it is unlikely that the accident will result in the degeneration process in her cervical spine.
>
> The likely cause of her symptoms after the injury would be a soft tissue injury. The majority of people with soft tissue injuries would settle down in 12 - maximum 18 months from the accident.
>
> Mrs Y was involved in RTA in October 2013 which resulted in temporary exacerbation of her symptoms.

> Mr Khatri indicates that small portion of people would develop chronic pain behaviour which can be also without any injury however is not able to offer any organic explanation for the severity of the symptoms and the disability that she has.
>
> Her symptoms are unlikely to subside or disappear in the foreseeable future and she will require ongoing input from the Pain Management Team.
>
> Taking into account the available evidence including the nature of her injury, her underlying, though asymptomatic, degenerative changes together with the trajectory of her symptoms and exacerbating effect of further RTA in October 2013 it is accepted that she suffered soft tissue damage which should have resolved within maximum 18 months. Any persistent symptoms, functional restrictions or associated PLOEA is likely to be due to her constitutional degenerative changes.
>
> It is my opinion that, on the balance of probabilities, the evidence in this case confirms that the following injury, soft tissue injury to neck and back was contracted in the course of the person's NHS employment and is wholly or mainly attributable to that NHS employment.
>
> It is my opinion that, on the balance of probabilities, the evidence in this case does not confirm that the incapacitating effects of the attributable condition are permanent."

In its Stage Two IDRP letter dated 26 June 2017, NHSBSA said that:

> "The Court of Appeal judgement of January 2017 has clarified that an injury that is wholly or mainly attributable to an applicant's NHS employment does not have to be the sole/dominant or **the** operative cause of an applicant's PLOEA; an injury accepted as being wholly or mainly attributable to NHS employment only has to be **an** operative cause (or one of the causes) in order for an applicant to qualify for a PIB award.
>
> I have undertaken a very full and thorough review of your application, taking into account all the available relevant evidence and the recommendation made by the SMA…
>
> …having taken advice from the SMA, I am satisfied that the evidence and information available allows me to conclude that the injuries for which you have claimed PIB are not wholly or mainly attributable to your NHS employment; as such the legislative requirements of the Scheme have not been met and you are not entitled to PIB…
>
> The SMA has concluded that the injuries of 2 and 3 July 2012 for which you have claimed PIB are not wholly or mainly attributable to your NHS employment and

therefore it has not been necessary to proceed to consider whether the reported injuries had been an operative cause on any PLOEA that you may have suffered.

The additional medical evidence comprises:

- a report provided to the court by Dr Theodossiadis, Consultant Psychiatrist dated 21/7/16;
- a report provided to the court by Dr Liebeman, Consultant in Pain Medicine and Anaesthesia dated 4/5/16;
- a report from Dr Mohammad, Consultant Spinal Surgeon, dated 14/7/15;
- a report from Mr Khatri, Consultant Spinal Surgeon, dated 13/7/15;
- a letter from Mrs Y dated 23/4/15 stating the grounds for her appeal

I confirm that in addition to this evidence I have reviewed all of the previously available evidence and that I have not advised on this application.

The evidence as a whole indicates that the applicant has contracted the disease of spondylosis with radiculopathy, affecting the neck and the lumbar spine…

On the basis of this evidence, it CANNOT be accepted that the applicant contracted spondylosis of the spine in the course of her employment…She has evidence of back pain symptoms preceding her employment by many years (over a decade). These are considered likely to have arisen from her spondylosis. It is typical of this condition that it affected both the neck and the lumbar spine, with low back pain symptoms starting first, then neck pain symptoms which started many weeks after the index events which she claimed to have caused her condition...

In summary the SMA has concluded that the back and neck injuries for which you have claimed PIB are not wholly or mainly attributable to your NHS employment and therefore as the legislative requirements of Regulation 3(2) have not been met you are not entitled to PIB.

In reaching this recommendation, the SMA has commented on the mechanism of injury in that they do not accept that there was any significant external trauma or twisting force applied to the back or neck at the time of the events of July 2012. Having considered the evidence as a whole, the SMA has concluded that it is very unlikely that the two events altered your lumbar spinal disease in any significant way. The SMA has explained that in their opinion the evidence is of intermittent pain over a period of at least six months with this increasing on 2 and 3 July 2012 following minor events at work. They have explained that it is their opinion that you have a pre-existing degenerative disease which had reached the point of being painful in the six months prior to July 2012 and the claimed events themselves were not the cause of your condition.

The SMA has also considered whether your NHS duties throughout your period of your NHS employment were the whole or main cause of your back and neck condition; they have opined that based on the evidence available and current

clinical understanding of the factors that cause degenerative disease of the spine, your employment as a nurse within the NHS has not contributed to the degenerative disease of the spine nor hastened your absence from work.

It is understood that you did not originally claim for a psychological condition arising from the events of July 2012; however for completeness the SMA has also considered whether this health condition is wholly or mainly attributable to your NHS employment. For the reasons given within their detailed rationale, they have concluded that it is not wholly or mainly due to your NHS employment."
