

Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Mrs E' 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 E's complaint against NHS BSA concerns the refusal of her application for Permanent Injury Benefits (**PIB**).

Background information, including submissions from the parties

4. The relevant regulations are the National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended) (**the Regulations**). Regulation 3 provides,
“(1) ... these Regulations apply to any person who, while he -
(a) is in the paid employment of an employing authority ...
... sustains an injury before 31st March 2013, or contracts a disease before that date, to which paragraph (2) applies.
(2) This paragraph applies to an injury which is sustained and to a disease which is contracted in the course of the person's employment and which is wholly or mainly attributable to his employment and also to any other injury sustained and, similarly, to any other disease contracted, if -
(a) it is wholly or mainly attributable to the duties of his employment ...”
5. Regulation 4 sets out the scale of benefits which may be paid and provides,

“(1) 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 ...”

6. Mr E worked as a Specialist Psychological Therapist for the NHS. She applied for PIB in April 2014 then, in August 2014, she left employment on grounds of ill health. Mrs E said she was suffering from chronic, work related stress, including bullying from Spring 2011. She said this had affected her mental health, exacerbated her asthma and increased her susceptibility to chest infections that had resulted in further permanent loss of lung function. Mrs E said in June 2014, she was awarded Tier 2 under an ill health retirement pension and in February 2015, she was awarded a temporary injury allowance.

7. On 11 July 2014, NHS BSA sent Mrs E a decision letter informing her that her application for PIB had been unsuccessful. It concluded that:

“It is my opinion that, on the balance of probabilities, the evidence in this case confirms that this applicant developed temporary exacerbation of anxiety and depression in the course of her NHS employment, which was wholly or mainly attributable to that NHS employment...It is my opinion that the [sic] on the balance of probabilities the evidence in this case does not confirm that the incapacitating effects of the accepted condition are permanent”.

8. Mrs E appealed under the Scheme’s internal dispute resolution procedure (**IDRP**). NHS BSA issued a stage one decision, on 20 February 2015, declining Mrs E’s appeal. It quoted from its medical adviser:

“The evidence indicates that her lung function has deteriorated since the significant respiratory infection in September 2011. It is also acknowledged that stress related symptoms can lead to non-infective exacerbations of asthma, it is not accepted that stress related symptoms can result in infective exacerbations of asthma/COPD...Ms E has had counselling therapy and St John’s Wort to treat her psychological symptoms. Symptoms of anxiety and depression are usually amenable to treatment. She has not taken any type of anti-depressant medication to date. Nor has she been referred for specialist assessment and treatment...the fact that she has not been assessed and managed through appropriate specialist services makes it unlikely that the permanence of her symptoms and their incapacitating effects on her job can be established”.

9. Mrs E appealed NHS BSA’s stage one decision. On 5 July 2017, around the same time that she contacted this Office, NHS BSA sent Mrs E a response under stage two of the IDRP. It apologised for the delay in responding to her, which was due to the ongoing Court of Appeal judgment of January 2017 in *Young v NHS Business Services Authority*. It declined Mrs E’s application for PIB and quoted from its medical adviser:

“...it can be accepted that the applicant contracted anxiety and depression in the course of her NHS duties...it cannot be accepted that the applicant contracted chronic obstructive pulmonary disease in the course of her NHS duties...the applicant’s depression and anxiety symptoms would have resolved when the grievance matters were resolved. Therefore, any impact on earning ability would have been at most temporary. Depression and anxiety arising from work factors would not be expected to result in any loss of earnings on a permanent basis as they were symptoms which were reactive to temporary stressful events only...Therefore anxiety and depression at that time can be wholly or mainly attributed to her NHS duties. This is consistent with the first appeal for temporary injury allowance. Chronic respiratory disease...was not contracted in the course of the NHS employment...”

10. On 25 October 2017, NHS BSA sent this Office a formal response. It said that:

“...it was accepted that she had developed a temporary exacerbation of anxiety and depression due to perceived work stressors in the course of her NHS employment and which was wholly or mainly attributable to that employment. However, the medical adviser explained that in their clinical opinion with appropriate medical treatment the temporary exacerbation of anxiety and depression was on the balance of probabilities likely to resolve, such as [sic] an outcome would be prior to age 65. As the Scheme’s medical adviser did not consider that the incapacitating effects of the accepted injury were permanent, it was concluded that Mrs E had not suffered any PLOEA as a result”.

Mrs E’s position:-

- NHS BSA did not take account of all Mrs E’s medical evidence such as Respiratory Consultant’s Report and GP letters; that confirms that stress at work has had a serious impact on her lung function.
- She believes that the judgment in Young v NHS BSA applies to her case.
- There was a 21-month delay between NHS BSA’s stage one and two responses.
- She refers to a letter, dated January 2016, from her GP, that makes it clear her symptoms are ongoing and relate to NHS employment.

NHS BSA’ position:-

- In order to qualify for PIB, the requirements of both Regulation 3(2) and Regulation 4(1) need to be satisfied.
- All of Mrs E’s evidence have been considered and its medical advisers provided a comprehensive rationale.

- Exacerbation to Mrs E's lung function in September 2011 followed exposure to cleaning fluids and chest infection.
- Mrs E's incapacity to work was due to respiratory pathology, and mental health symptoms associated with respiratory ill health.

Adjudicator's Opinion

11. Mrs E'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:-

- Whilst NHS BSA accepts that Mrs E developed a temporary exacerbation of anxiety and depression due to work stress, which was wholly and mainly attributable to that employment, it does not accept that her chronic lung condition is wholly or mainly due to NHS employment.
- In November 2014, this Office made a Determination on a case with similar issues to Mrs E's, *Young v NHS BSA*. Mrs Young appealed that Determination and succeeded on appeal in July 2015. NHS BSA then appealed but the Court of Appeal rejected its (NHS BSA's) appeal in January 2017.
- In summary, the outcome of the Court of Appeal's findings was that NHS BSA had failed to ask the correct statutory question. The relevant condition in *Young*, for the purpose of Regulation 3, was not a degenerative condition she suffered from; that was only relevant to Regulation 4. Rather, it was an injury Mrs Young had sustained whilst attending a patient. NHS BSA accepted that was the case and also accepted that Regulation 3 was satisfied, therefore the appeal focused on Regulation 4.
- The Adjudicator noted that Mrs E believed that *Young v NHS BSA* applies to her case. The Adjudicator understood why Mrs E considers that to be the case, as there are certain similarities; both individuals had underlying conditions which meant they might react less favourably to triggers. However, in Mrs Young's case, it was her degenerative back condition. In Mrs E's case, it was her COPD. NHS BSA says the Ombudsman had previously acknowledged and accepted that the wholly or mainly attributable test does not provide for exacerbation of a pre-existing condition, even if the exacerbation was mainly attributable to the NHS employment. It cited PO-1249 and 81606/1. However, those cases pre-date the *Young* judgments. Nevertheless, the Adjudicator disagreed with Mrs E's assertion that *Young v NHS BSA* applied to her case, as *Young* focused on a different issue. In Mrs E's case, the issue is whether her reduction in earnings ability is more than 10% by reason of her work stress.
- NHS BSA accepts that Mrs E's stress was attributable to her NHS employment. NHS BSA had to then consider what effect that stress had on her health condition.

It accepted that Mrs E suffered from anxiety and depression as a result of the stress but the question it had to ask is whether that anxiety and depression was of a permanent nature. The Adjudicator noted that Mrs E's anxiety and depression was temporary and resolved with time therefore she would not have suffered permanent loss of earning ability (**PLOEA**) by more than 10%.

- NHS BSA applied the same test to Mrs E's lung condition. NHS BSA says that Mrs E's COPD is not attributable to her NHS employment and that the deterioration in her condition was due to a chest infection not to cleaning fluids. Whilst NHS BSA accepts that Mrs E developed a temporary exacerbation of anxiety and depression due to work stress which was wholly and mainly attributable to that employment, it does not accept that her chronic lung condition is wholly or mainly due to NHS employment.
 - The question that NHS BSA was required to ask was whether Mrs E's work stress had caused her to suffer a permanent reduction of earnings ability of more than 10%. NHS BSA concluded that the reduction in her earnings ability was of a temporary nature hence it paid her a temporary injury allowance. NHS BSA considered Mrs E's medical evidence, specifically her Respiratory Specialist's report which she has referred to. Its medical adviser concluded that stress related symptoms can lead to non-infective exacerbation of asthma/chronic lung condition; however, stress related symptoms cannot lead to an infective condition.
 - The Adjudicator was satisfied that NHS BSA had complied with the Scheme's Regulations and that all relevant evidence had been considered. It is for NHS BSA, in consultation with its medical advisers, to decide how much weight to attach (if any) to that evidence.
 - The Adjudicator noted that Mrs E's specialist said that stress had had a serious impact on her lung condition. It was noted that there was a difference of medical opinion between the medical adviser and Mrs E's treating doctors as to her permanent reduction in her earnings ability. However, in the Adjudicator's view this was not sufficient for the Ombudsman to say that NHS BSA's decision to accept the opinion of its own medical advisers (who are experts in occupational health) was perverse.
 - The Adjudicator also noted NHS BSA's delay in providing its stage two response. However, it did explain to Mrs E that this was due to awaiting the decision in the ongoing Court of Appeal case of Young. Therefore, the Adjudicator did not uphold the complaint.
12. Mrs E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs E 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 E for completeness.
13. Mrs E has said that the Adjudicator did not consider her key points:-

- Certain events such as two of her grievances and OH reports dated March 2012.
- Medical research evidence and the range and volume of it.
- The evidence suggests that stress made her breathing worse and there is an ongoing impact on her mental health.
- The interpretation of *Young v NHS BSA* does not seem to match what one of the NHS BSA's lawyers has published on the NHS website.

Ombudsman's decision

14. Regulations 3(2) and 4(1) call for a two-stage process. The first stage is for NHS BSA to determine whether Mrs E has sustained an injury which is wholly or mainly attributable to her NHS employment. The second stage is for it to determine the effect of the injury.
15. NHS BSA agrees that it should separate the question of injury from the question of PLOEA. In reaching the decision, NHS BSA must take into account all relevant but no irrelevant factors.
16. As explained by the Adjudicator, NHS BSA agreed that Mrs E's stress was attributable to her NHS employment. However, as concluded by the Scheme's medical advisers it did not consider Mrs E's anxiety and depression was of a permanent nature so would not have suffered PLOEA by more than 10%. Therefore, she did not meet the second limb of the criteria under the Scheme Regulations. It is clear that NHS BSA considered Mrs E's application in accordance with the relevant Regulations, and it also obtained comments from the medical advisers in relation to the specific points raised by Mrs E. By doing this, NHS BSA has demonstrated that all relevant facts were considered, and all relevant questions asked.
17. Whilst I appreciate that Mrs E's assertion is that the Adjudicator's interpretation of *Young v NHS BSA* does not match the interpretation provided by an NHS lawyer, I am satisfied that, based on the facts of Mrs E's case, the Court judgment is not applicable to her case.
18. Mrs E asserts that the Adjudicator did not review the medical evidence and the range and volume of it. 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 E'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.

19. NHS BSA was aware of the difference in medical opinions amongst the medical experts consulted at the various stages of Mrs E's application on the impact of stress on her breathing. However, there is a difference between ignoring an opinion and not accepting it after due consideration. I do not find that NHS BSA has ignored the medical opinions or research supporting Mrs E's PIB application, rather it has decided to accept the advice of its own medical advisers. Moreover, it is entitled to give more weight to its own medical adviser's opinion.
20. So, I do not find that there has been maladministration in the way NHS BSA reached its decision on Mrs E's PIB application.
21. Therefore, I do not uphold Mrs E's complaint.

Anthony Arter

Pensions Ombudsman
29 June 2018