The Pensions Ombudsman

Ombudsman's Determination

Applicant	Mrs D
Scheme	NHS Injury Benefits Scheme (**the Scheme**)
Respondent	NHS Business Services Authority (**NHS BSA**)

Outcome

1. I do not uphold Mrs D'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 D's complaint against NHS BSA is about its decision to refuse her Permanent Injury Benefit, (**PIB**), as it says she has not suffered a permanent loss of earning ability (**PLOEA**).

Background information, including submissions from the parties

4. The Scheme provides PIB for members who suffer **PLOEA** in excess of 10% as a result of an injury sustained or disease contracted which is wholly or mainly attributable to their NHS employment. 'Permanent' in this context means to normal retirement age of 65.

5. The relevant regulations which are pertinent in this case are Regulation 3(2) and Regulation 4(1) of the NHS Injury Benefit Regulations 1995 (as amended) (**The Regulations**), which are set out in Appendix 1.

6. Mrs D worked as a Staff Nurse for the NHS. On 11 October 2011, Mrs D suffered an injury as a result of a patient's assault and commenced sickness absence from 12 October 2011 to 22 April 2012 and from 10 May 2012 to 11 September 2014 when Mrs D's employment subsequently ceased with the NHS.

7. On 27 October 2014, Mrs D applied for PIB.

8. On 12 March 2015, NHS BSA sent a decision letter to Mrs D rejecting her application. It said that:

> "It is considered that the incident occurred as claimed and the applicant sustained an injury to her right wrist, hand and fingers. The scapholunate problems, full thickness tear of TFC and S-L ligament bagginess, right wrist are considered to be wholly or mainly attributable to the index event and therefore the duties of her NHS employment. She had prior upper limb and neck problems (both sides). She did not report problems with her elbow, shoulder or neck in any close temporal (time) relationship with the index event. It is not accepted that these subsequent symptoms are wholly or mainly attributable to the duties of the NHS employment. By 03/06/13, Mr Russell [consultant orthopaedic surgeon] wrote that she had seen a very marked improvement in her symptoms and had regained an excellent range of movements in her wrist with no pain. It is considered that the evidence indicates that relevant injuries had resolved sufficient for her to resume her NHS role by that time. The evidence does not confirm, on balance, that there is relevant permanent impairment. Therefore, there can be no relevant permanent loss of earning ability."

9. In October 2015, Mrs D appealed against NHS BSA's decision by invoking the Scheme's two-stage internal dispute resolution procedure (**IDRP**). Mrs D provided further medical evidence including reports from occupational health, consultant's reports, physiotherapy report, a report from her GP, and medicolegal reports. A report from Mrs D's GP confirmed that "In my view she should be eligible for Permanent Injury Benefit at the maximum level given regards to her age and her not being able to go back to her usual job as a Staff Nurse for which she worked hard to gain the degree".

10. NHS BSA subsequently sent Mrs D two holding letters dated 16 October 2015 and 20 November 2015 informing her that it was still in the process of obtaining further medical information on behalf of her.

11. On 15 December 2015, NHS BSA sent Mrs D a response under stage one of the IDRP. NHS BSA confirmed that it had considered all the additional information provided by Mrs D including relevant sections of Mr Logan's, (Hand, Wrist and Elbow Specialist), letter. The letter said that:

> "In relation to the index Incident and mechanism of injury, there has been some differing opinion on the mechanism and likely results. The GP and Occupational Physician statements are noted however the fully argued opinions of the Orthopaedic Surgeons are preferred. The index incident caused wrist damage and this was successfully treated surgically with excellent functional improvement noted by the Orthopaedic Surgeon in 2013. Other Orthopaedic opinion has been that the elbow and shoulder conditions causing continuing symptoms were not likely to be attributable to the index incident. There has been Orthopaedic opinion, based on reporter symptoms, that there has developed a chronic regional pain syndrome although examination evidence did not support this. The Specialist could not explain

symptoms of global wrist pain in 2014…It is my opinion that, on the balance of probabilities, the evidence in this case confirms that a wrist and hand injury was wholly or mainly attributable to the NHS employment however on the balance of probabilities the evidence in this case does not confirm that the incapacitating effects of the attributable condition are permanent. Therefore, there is no associated permanent loss of earning capacity".

12. Mrs D appealed against NHS BSA's decision by invoking stage two of the IDRP. In her appeal, Mrs D provided further medical evidence including a letter from Mr Gething, a copy of her medical records from 1 May 2015 provided by Gowerton Medical Centre, a letter to Dr Crossland from Mr Ruddle, Consultant Vascular Surgeon, dated 15 June 2015. Mrs D also provided a list of physiotherapists she had seen at various times.

13. On 7 October 2016, NHS BSA sent a response to Mrs D under stage two of the IDRP that said:

> "The medical adviser took the view that it was not necessary to gather further medical evidence from the additional Physiotherapists in the list provided…and I agree with their decision; the reason for this has been clearly explained by the medical adviser (relevant sections of this report are cited in Appendix 2). It is also noted that both Mr Logan and Mr Robertson, who is also a Consultant Orthopaedic Surgeon, accept that there are no factors within the hand or wrist joint which would prevent you from returning to work as a nurse with limited moving and handling."

14. On 11 November 2016, Mrs D sent NHS BSA several comments in response to its stage two decision.

Mrs D's position:-

- NHS BSA is biased in its selective use of reports and omitting some of the expert opinions such as Mr Collins, Senior Trauma Physiotherapist, Mr Fliglestone, Consultant Vascular Surgeon, Mr O'Malley, Occupational Health Practitioner and notes from A&E.

- Mr Robertson's point of causality has been misunderstood by NHS BSA that says, "without the injury at work to the wrist there would be no elbow and shoulder symptoms".

- There are contradictions throughout NHS BSA's stage two response which are indicative of a poorly written and researched report that has not satisfactorily explored the serious injuries she sustained as a result of the assault.

- Mr Robertson is not a specialist in regional pain nor an anaesthetist or physician who has expert knowledge of pain management therefore NHS BSA should not have chosen his report over that of an expert.

- Golfer's elbow is not common but commonly occurs with trauma incidents.

15. On 18 November 2016, NHS BSA sent a letter to Mrs D in response to her comments. The letter said that:

    "You have raised several concerns, and I aim to answer these below…Some of your concerns are clinical in nature, and therefore I have referred these to the Medical Adviser…it is not the function of the medical advisers to question every piece of information placed before them, but rather to weigh it all very carefully, taking into account its source and the purpose for which it was prepared. This is also true of the decision makers…Once the response has been received from the Medical Adviser I will forward their comments to you under separate cover."

16. On 28 November 2016, NHS BSA sent Mrs D a letter providing further comments from its Medical Adviser (**MA**). The main comments are as follows:

    "…I must confirm that the reports of Mr Fliglestone and all of the occupational health records and reports have been considered in reaching my conclusions. Mr Collins is now deceased. Physiotherapy treatment records have been summarised by Mr Robertson, who has provided an expert opinion in this case and a number of specific physiotherapy reports have been viewed…I do not think that any further medical information or reports from Dr Egeler or his colleagues will provide any further insight into the causation of the applicant's symptoms. I do not consider that obtaining the original accident and emergency records will provide any further assistance…Golfer's elbow is a degenerative condition of a ligamentous structure which deteriorates and becomes swollen in response to repeated stressful movement over prolonged periods of time. It is a common condition…There is a great deal of clinical information available, including evidence from physiotherapists. It is unlikely that any further clinical reports will provide any further details regarding attribution of injury, particularly in the presence of multiple reports from specialist medical and orthopaedic doctors, including two expert orthopaedic surgical opinions provided by the applicant's solicitors…In any case, Mr Collins is noted by the applicant to be deceased so it is not possible to make contact with him personally".

17. In September 2017, Mrs D brought the complaint to this Office. In her submission Mrs D made several comments. However, I consider her key point is that NHS BSA relied heavily on the assertion that there was no medical evidence regarding her upper limb condition or that this condition was ever reported.

18. On 18 December 2017, NHS BSA sent this Office a formal response that maintained its stance and added that:

    "In order for entitlement to PIB to be granted, the requirements of both regulation 3(2) and regulation 4(1) need to be satisfied…A range of opinions

may be given from various sources, all of which must be considered and weighed. However, the fact that Mrs D does not agree with the conclusions drawn and the weight attached to various pieces of evidence does not mean that any conclusion is necessarily flawed".

Adjudicator's Opinion

19. Mrs D'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: -

    - The Adjudicator explained that it is not the Pensions Ombudsman's role to review the medical evidence and come to a decision of his own as to Mrs D's entitlement to a PIB. That decision is for NHS BSA to make. The Ombudsman is primarily concerned with the decision making process. If this is found to be flawed, the decision can be remitted back for NHS BSA to review. The medical evidence is reviewed in order to determine whether or not it is appropriate and supportive of the decision by NHS BSA.

    - However, the weight which is attached to any of the evidence is for NHS BSA to decide, including giving some of it little or no weight. It is open to NHS BSA to prefer evidence from its own advisers; unless there is a cogent reason why it should not, or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant regulations by the medical adviser. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted back to NHS BSA to reconsider.

    - NHS BSA needed to consider Mrs D's PIB application in accordance with the Scheme's regulations and properly explain why her application either can or cannot be approved.

    - Essentially, in order to be entitled for a PIB, a member must meet two criteria under the Scheme's regulations. The first criterion under regulation 3(2) is that a member must have sustained an injury or contracted a disease in the course of their NHS employment and that the reported injury or disease was wholly or mainly attributable to their NHS employment. NHS BSA accepted that Mrs D's sustained injuries to her right wrist and hand was wholly or mainly attributable to her NHS employment. The outstanding dispute is whether or not Mrs D's elbow, shoulder and neck conditions are considered to be related to the injury sustained in October 2011. Mrs D's case has been reviewed by the MA who has noted and accepted comments from Mr Russell, Consultant Orthopaedic Surgeon which showed that by 3 June 2013, Mrs D's injuries had resolved sufficiently to allow a return to her NHS role. Further, the MA noted that Mrs D did not show any symptoms relating to her elbow, shoulder and neck at the time of the incident. It

was noted that the MA had considered Mrs D’s complex condition, as set out in Appendix 2, and concluded that at such a young age, she will be able to train in alternative nursing roles where there are minimal requirements for moving and handling.

- The Adjudicator appreciated the complicated nature of Mrs D’s condition, however she was satisfied that the MA and subsequently NHS BSA have properly considered all her medical evidence and provided appropriate explanations to support his opinion which was based on the medical evidence. The Adjudicator did not believe that there were any justifiable grounds to find that errors were made in process of considering Mrs D’s PIB application. NHS BSA is entitled to prefer the opinion of its MAs over that of Mrs D or her doctors as long as there is no cogent reason why it should not.

20. Mrs D requested that her case be passed to me to consider. Mrs D refers to medical reports from her treating doctors, which are dated after the date she brought the complaint to this Office, that show her health condition has deteriorated and to date, she has not been able to return to her full regular duties.

21. Mrs D’s 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 D for completeness.

Ombudsman’s decision

22. I sympathise with Mrs D, as it is clear her previous NHS 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 made an administrative error.

23. NHS BSA requested independent advice from its MAs as part of considering Mrs D’s initial PIB application and appeals. It is clear that NHS BSA considered Mrs D’s application in accordance with the relevant regulations, and it also obtained comments from the MAs in relation to the specific points raised by Mrs D. By doing this, NHS BSA has demonstrated that all relevant facts have been considered, and all relevant questions asked.

24. The MAs have then provided reasonable responses to Mrs D’s points, and affirmed that there are suitable alternative nursing roles for her, despite her health condition. As such, I do not believe NHS BSA’s decision making process to decline Mrs D’s PIB application was flawed.

25. Mrs D has referred to the medical reports of September/ October 2017, that confirm her condition worsened and she has now been diagnosed with Thoracic Outlet Syndrome.

26. But as these reports were not available to NHS BSA when it made its final decision it is not relevant to my determination.

27. Therefore, I do not uphold Mrs D’s complaint.

Anthony Arter

Pensions Ombudsman
11 June 2018

Appendix 1

NHS Injury Benefit Regulations 1995 (as amended)

3. Persons to whom the regulations apply

(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;

(b) it is sustained while, as a volunteer at an accident or emergency, he is providing health services which his professional training and code of conduct would require him to volunteer; or

(c) it is sustained while he is travelling as a passenger in a vehicle to or from his place of employment with the permission of the employing authority and if in addition—

(i) he was under no obligation to the employing authority to travel in the vehicle but, if he had been, the injury would have been sustained in the course of, and have been wholly or mainly attributable to, his employment, and

(ii) at the time of the injury the vehicle was being operated, otherwise than in the ordinary course of a public transport service, by or on behalf of the employing authority or by some other person by whom it was provided in pursuance of arrangements made with the authority.

4. Scale of benefits

(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 and who makes a claim in accordance with regulation 18A.

Appendix 2

IDRP stage two; “Attribution”:

“In this case, IT IS NOT accepted that there was any injury to the forearm, elbow, upper arm, shoulder or neck as was claimed at section 8, based on the contemporaneous record of the applicant, the injury form and the two witness statements. The mechanism of injury (whereby the fingers, wrist and thumb were squeezed then pulled back with sufficient force to rupture the triangular cartilage) is not consistent with a twisting injury of the whole arm wrenching the elbow or shoulder.

IT IS NOT accepted that she developed carpal tunnel syndrome on the right side or an ulnar nerve problem at the elbow on the right side because nerve conduction tests were normal. It is common for patients to report symptoms that may be suggestive of carpal tunnel syndrome, but to have no abnormality of nerve tests, such that most hand specialists are reluctant to operate on this condition in the absence of very marked symptoms or in the presence of positive test results. In any case, there is no evidence that ongoing right sided carpal tunnel is a current obstacle to work. Thus IT IS NOT accepted that carpal tunnel syndrome is attributable to her injury at work or that any permanent loss of earnings has been caused by this condition.

IT IS ACCEPTED that the applicant developed right golfer's elbow (medial epicondylitis) as this corresponds with her symptoms and was shown on MRI scan. IT IS NOT accepted that this can be wholly or mainly attributed to the assault because the contemporaneous records indicate that the elbow was not injured at the time and there were no elbow symptoms until 9/7/12.

IT IS ACCEPTED that she has subacromial bursitis of the right shoulder. IT IS NOT accepted that this was wholly or mainly attributable to the assault. She complained once of shoulder pain to her GP on 3/11/11, but did not report this to the A and E department when she attended the day before or the day after. It is likely therefore to have been a transient symptom of no medical consequence at the time. The first report which indicated shoulder symptoms thereafter was 3/6/13, more than six months later.

I have accepted Mr Logan's opinion that there is too long a time a delay between the assault and the development of elbow or shoulder symptoms to attribute them to the assault. I have accepted that most of these conditions arise spontaneously and this is what the records indicate has occurred in this case, in my view.

Pain experienced in this case is not consistent with the limited extent of the remaining physical disease (mild epicondylitis and bursitis). There is no evidence of any specific traumatic event in this case to the elbow or shoulder. I take the view that the chronic pain problem she has is unrelated to the injury at work and would have occurred in any case, as a consequence of mild epicondylitis of the elbow and bursitis of the shoulder, both naturally occurring conditions. The unexpectedly severe pain is due to personal biopsychosocial factors.

"Permanent loss of earning ability":

"The conditions for which attribution [sic] are accepted were successfully treated by surgery. The opinions of the orthopaedic experts are consistent with the view that these are no longer a barrier to her returning to work as a nurse in an outpatient setting, avoiding moving and handling.

At her young age, she would also be able to train in alternative nursing roles, such as in occupational health or disability assessment, where there are minimal requirements for moving and handling. She would also be able to work in a triage setting, working with DSE equipment and telephones, such as in the out of hours services. These roles would attract

the same salary as the nursing role she had previously and her career would be expected to progress in the normal fashion, irrespective of the injury to the triangular fibro-cartilage. For this reason, there is no permanent loss of earnings in this case due to the injury for which attribution has been accepted."