Ombudsman's Determination

Applicant	Ms E
Scheme	NHS Injury Benefits Scheme (**the Scheme**)
Respondent	NHS BSA

Outcome

1. Ms E's complaint against NHS BSA is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) NHS BSA should pay Ms E £500 for the significant distress and inconvenience she has suffered.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms E's complaint concerns NHS BSA's decision to decline her application for Permanent Injury Benefit (**PIB**) and the length of time it took for a decision to be reached.

Background information, including submissions from the parties

4. On 15 June 2012, Ms E suffered an injury to her wrist whilst at work. Following this, she was signed off by her GP.

5. On 23 July 2013, Ms E's GP recommended a return to work on lighter duties for two weeks and Ms E asked her employer to return to work. I understand Ms E's manager challenged the GP's recommendation and referred her to the employer's occupational health (**OH**) department.

6. On 5 September 2012, Ms E met with OH. In the subsequent report, OH confirmed that Ms E's wrist injury had made a good recovery, but that:

> "She continues to have significant symptoms associated with emotional distress and unhappiness about the way in which she feels that her case had been managed after the incident and for some weeks thereafter."

7. Consequently, OH confirmed that Ms E was unable to return to work at that time. She met with OH several times in the following months, but her symptoms did not improve.

8. On 1 March 2013, Ms E applied for Temporary Injury Allowance (**TIA**). The incident or trigger for the injury was described by Ms E as:

> "Wrist injury occurred at 2.50pm on Friday 15th June 2012. Emotional distress felt when I was refused the opportunity to return to the workplace as of my fit note dated 23rd July 2012. Diagnosis of Depression was made on 2nd October 2012."

9. On 2 April 2013, Ms E added:

> "I was prevented from returning to the workplace on 23/7/2012 with a fit paper issued by my G.P. who recommended lighter duties for 2 weeks.
>
> I believe this suspension was unnecessary and deliberate due to other reasons which are currently under formal investigation.
>
> Consequently I was diagnosed as suffering from Acute Emotional Distress and latterly Depression."

10. In June 2013, NHS BSA wrote to Ms E confirming that she met the criteria for TIA under the Scheme rules. The application was agreed by the medical adviser based on two periods:-

- Ms E's wrist injury had caused her sickness absence between 29 June 2012 and 5 September 2012.
- Ms E's depression was the main cause of absence since 5 September 2012.

11. In the report, the medical adviser stated:-

> "This depression is considered to be very likely to resolve with treatment and with resolution of her perceived work issues."

12. On 31 July 2014, Ms E met with OH. In the report that followed, OH recommended that a new role be found for Ms E, in a separate department, in order to allow her to return to work.

13. On 3 September 2014, Ms E resigned from her employment after concluding that she was too unwell to return to work.

14. On 27 November 2014, NHS BSA received Ms E's PIB application. Following some initial confusion as to whether the application had been received, NHS BSA confirmed its target for providing a response was 40 days, although it may be extended where additional information was necessary.

15. On 26 March 2015, NHS BSA wrote to Ms E confirming that her application for PIB had been declined.

16. The criteria that was applied to Ms E's application was:

> "In order for the application to be successful it must be accepted that the applicant has an injury which is sustained or a disease which is contracted in the course of the person's NHS Employment and which is wholly or mainly attributable to that NHS employment, AND that a permanent Loss of earning ability (PLOEA) of more than 10% has arisen in consequence of that injury or disease. Permanent means to age 65.
>
> Relevant PLOEA is evaluated as a percentage of the pensionable pay at the time employment ends or the time the successful applicant moves to a lower paid employment."

17. Although it was accepted that Ms E had suffered an injury that was wholly or mainly attributable to her duties, the medical adviser was not satisfied that this had resulted in a permanent loss of earning ability (**PLOEA**). The Medical Adviser concluded:

> "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, emotional distress – depression, are permanent and give rise to permanent loss of earning ability.
>
> The evidence indicates that [Ms E] is medically fit for similar work in a different location."

18. In April 2015, Ms E appealed the decision under the Internal Dispute Resolution Procedure (**IDRP**). In her appeal, she highlighted that in addition to the injury suffered, she had pre-existing conditions which required workplace adjustments, and realistically these adjustments would not be met in a different workplace. Additionally, because of her treatment by a senior management in her former workplace, she would be unable to take a different role there even if it was in a different department.

19. On 16 April 2015, NHS BSA referred the matter to a new medical adviser. It stated that the statutory deadline for a response to such an appeal was 11 June 2015.

20. On 27 May 2015, the medical adviser requested further evidence from Ms E's GP.

21. On 8 June 2015, Ms E met with Dr Jenkins, a consultant Psychiatrist. He issued a report on 15 June 2015.

22. Also, on 15 July 2015, Ms E's GP provided the medical adviser with a summary of her condition at that time.

23. On 5 October 2015, Ms E highlighted that the response timeframe had been missed and requested that her case be prioritised due to her financial circumstances.

24. On 16 October 2015, the medical adviser requested sight of Dr Jenkins' report.

25. On 18 November 2015, following discussions with her solicitor, Ms E provided Dr Jenkins' report to the medical adviser.

26. On 27 November 2015, having had sight of Dr Jenkins' report, NHS BSA placed Ms E's complaint on hold due to the presence of a pre-existing condition. The assessment of her application would be impacted by a related Court case, Young v NHS BSA (**the Young judgment**).

27. On 15 December 2015, NHS BSA wrote to Ms E explaining the need for the case to be put on hold.

28. On 29 December 2015, Ms E challenged NHS BSA's decision to place her case on hold. She highlighted that her application had been made before the current issues had arisen and therefore it should not affect her claim. Additionally, her claim had been delayed beyond the timescales set by NHS BSA.

29. Over the course of January and February 2016, NHS BSA corresponded with Ms E regarding the Young judgment, explaining why it was relevant to her application. NHS BSA said that the case would not be heard by the courts until December 2016.

30. On 4 January 2017, Ms E chased NHS BSA on the outcome of the Young judgment. On the same day, NHS BSA responded confirming it was awaiting the judgment and that, following this, it would need time to consider the implications.

31. On 24 May 2017, NHS BSA wrote to Ms E to confirm the judgment had been handed down on 16 January 2017, and that it would not be appealing the outcome further. Her case would be returned to the medical adviser for consideration, however no specific timeframe could be provided.

32. On 3 July 2017, a report was provided to NHS BSA by a medical adviser. Their findings are summarised below:-

    - In relation to Ms E's wrist injury, it was sustained in the course of her employment and was wholly or mainly attributable to that employment. However, it was not accepted that the wrist injury had caused Ms E any PLOEA as the wrist recovered.

    - In relation to Ms E's clinical depression, the medical adviser accepted that the illness was sustained in the course of her employment but did not accept that it was wholly or mainly attributable to her employment. The medical adviser referred to Ms E's history of clinical depression and Dr Jenkins' findings that she had a 66% risk of recurrence because of her history. In the absence of corroborated evidence of workplace bullying, the medical adviser said that her current depressive episode was mainly due to pre-existing constitutional factors and that attribution should not be accepted.

33. On 15 September 2017, NHS BSA, on the basis of the medical adviser's report, wrote to Ms E declining her appeal and providing its stage one response. It concluded that

Ms E's wrist injury had not caused a PLOEA and her depression was not wholly or mainly attributable to her employment. Therefore, the criteria for PIB was not met.

34. The letter acknowledged that NHS BSA had previously accepted Ms E's emotional distress and depression as attributable to her employment but confirmed that the new medical adviser took a different view.

35. On 25 September 2017, Ms E made further representations to support her application and requested the matter be considered under stage two of the IDRP process. She made the following comments:-

- The medical adviser, when stating that her depression was not caused by her employment, had failed to confirm what the cause was.
- The medical history relied upon by the medical adviser was inaccurate.
- Dr Jenkins' report should not have been relied upon as it was factually incorrect and contained assumptions about events that he was not witness to. His report refers to a lack of corroborative evidence to support the claim of workplace bullying, but he had admitted to Ms E, at her appointment, that he had additional evidence that he could not access at that time. Ms E says that additional evidence would have corroborated her claims.
- Ms E also refuted Dr Jenkins' assumption that her depression was a result of constitutional factors.
- OH had expressed the view that her history of depression was irrelevant and that she had been "doing very nicely until this happened".
- It was not sufficient for the two medical advisers' opinions to be different; the reasons for the differences needed to be evidenced.
- Ms E argued that her pre-existing condition should be disregarded.
- Her former employer had failed to act on her complaints and interview the witnesses of the workplace bullying. She should not be held responsible for its failure to investigate those incidents.
- Ms E argued that it was "outrageous to suggest that having been granted TIA I do not qualify for PIB."

36. On 5 December 2017, NHS BSA provided its stage two response, having sought further advice from the medical adviser. This acknowledged that the wrist injury was no longer being submitted as a factor and focused on Ms E's depression. On reviewing his conclusions on Ms E's depression, the medical adviser noted that Ms E had highlighted factual inaccuracies in her medical history and concerns over her psychiatrist's report and took these concerns into account.

37. However, even allowing for those concerns, having reconsidered Ms E's medical history and past instances of depression, the medical adviser concluded that Ms E's depression was not wholly or mainly attributable to her duties. Rather, it was a result of her pre-existing recurrent depressive disorder and could not be attributed to her employment. In relation to whether pre-existing conditions should be taken into account, the medical adviser confirmed that in his view, it was a relevant consideration.

38. NHS BSA accepted the medical adviser's recommendation and declined Ms E's appeal.

39. Dissatisfied with the outcome of the IDRP, Ms E referred the complaint to this Office for investigation.

Adjudicator's Opinion

40. Ms E's complaint was considered by one of our Adjudicators who concluded that NHS BSA should pay Ms E an award in respect of the significant distress and inconvenience she had suffered. The Adjudicator's findings are summarised briefly below:-

- The Ombudsman's role is to assess whether NHS BSA had followed the relevant regulations regarding the payment of injury benefits, not to replace the decision maker.

- Ms E's application was impacted by the Young judgment, but over that period the relevant regulation, Regulation 3.2 of The National Health Service (Injury Benefits) Regulations 1995 (**the Regulations**) remained the same. It states:

> "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…"

- If the criteria for Regulation 3.2 is met, the benefit is award on a scale of PLOEA, the minimum of which is 10%, set out in Regulation 4.1.

- The Adjudicator was satisfied that the medical advisers had addressed the correct questions set out in the Regulations.

- Whilst there was an irregularity in the evidence relied upon at stage one of the IDRP, this issue was taken into consideration at stage two of the IDRP and in this respect the medical adviser acted appropriately.

- Ms E had argued that Dr Jenkins' report should be given less or no weight, was inaccurate, included assumptions and did not take account of all the evidence available to him. The Adjudicator concluded: the report was broadly accurate when describing Ms E's GP records; the suggested assumption was not said as an objective fact, and was a reasonable statement for a psychiatrist to make;

and, if Ms E found Dr Jenkins' report "totally unacceptable" it should not have been submitted in support of her application or the error contained should have been challenged at the time.

- Ms E's concerns over Dr Jenkins' report were taken into consideration at stage two of the IDRP and the Adjudicator concluded that there was no reason to discount it as relevant evidence.

- Ms E had been informed that the lack of evidence corroborating her assertion of workplace bullying was a factor in her complaint being declined at stage one, and yet she subsequently provided no additional evidence in support of that claim for the stage two appeal. The Adjudicator concluded that without that evidence, the medical adviser could not have reached a different opinion on the issue of workplace bullying.

- Although Ms E believed that the OH reports should have been given more emphasis, the Adjudicator noted that these had been considered, and that it was for the medical adviser to place what they deemed to be the appropriate weight on the evidence presented to them.

- Although Ms E had received TIA, the assessments are distinct, and medical advisers are entitled to differing opinions.

- The Adjudicator did not agree that pre-existing medical conditions were irrelevant as Ms E asserts. The Adjudicator was of the view that the Young judgment supports this stance.

- Having considered evidence presented, the Adjudicator concluded the outcome was rational and the complaint about the decision-making process could not be upheld.

- However, the Adjudicator considered that the process, as a whole, had taken too long, and even accounting for mitigating factors such as the Young judgment and requests for additional information, the delays will have caused Ms E significant distress and inconvenience warranting a payment of £500 in recognition of this.

41. Neither Ms E or NHS BSA accepted the Adjudicator's Opinion and the complaint was passed to me to consider. Both parties provided 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 the parties for completeness.

Ombudsman's decision

42. In response to the Opinion, Ms E highlighted the discrepancy between the TIA application, which was accepted, and the PIB one which was not. She cannot understand the differing opinions of the medical advisers.

43. Whilst I appreciate this appears inconsistent, medical advisers are entitled to reach different opinions even based on the same evidence, and they are separate tests. Additionally, the TIA application was considered on the basis of different evidence, and in particular, Dr Jenkins' report was not available. This difference of medical opinion does not mean Ms E's application was assessed incorrectly.

44. I also note, that the medical adviser's opinion on TIA says, "This depression is considered to be very likely to resolve with treatment…" which reinforces why the TIA was accepted, but the PIB might not be.

45. Ms E has also argued that the medical adviser ought to have had access to her employer's investigation file and the outcome of her grievance, which would have corroborated her claim of bullying. NHS BSA has confirmed that the documents Ms E referred to were not provided to it, and there is no evidence in the file submitted to this Office that they were available to the medical adviser. I would not have expected the medical adviser to have sought these types of documents if they were not aware of them and if they were satisfied that they could reach an opinion on the medical evidence already available.

46. Additionally, Ms E was aware that the medical adviser did not have access to the documents following the stage one opinion. If she had documents which corroborated the alleged bullying, the stage two appeal would have been the appropriate opportunity to provide them.

47. Ms E is also concerned that too much weight has been placed on her pre-existing condition and that the Young judgment means that pre-existing conditions should not be taken into consideration. I consider pre-existing conditions are relevant to Ms E's case. The point arising from the Young judgment is in relation to the test for PLOEA, under Regulation 4. However, Ms E's application was not considered under Regulation 4 as it did not meet the first test under Regulation 3.2, this being whether her injury was "wholly or mainly attributable to his employment…"

48. I appreciate Ms E disagrees with the medical adviser's opinion, however, I consider the correct questions were asked only the relevant evidence was considered, and the opinion reached was not irrational. On that basis I cannot find that the matter should be remitted back to NHS BSA.

49. NHS BSA has argued that there were no unnecessary delays in the consideration of Ms E's application, and the circumstances do not warrant the recommended £500 for distress and inconvenience.

50. In particular, NHS BSA points out that the Adjudicator was wrong to say that on receipt of Ms E's PIB application, it had 40 days in which to provide a response. It explains that the 40 day timescale only applies to responses through the IDRP, and not the initial review prior to that. Additionally, the Young judgment impacted injury benefit administration at that time.

51. I agree that the Adjudicator has made an error in his Opinion letter when suggesting that the 40 day timescale applied to the initial review. I also acknowledge that where additional evidence is needed for a medical adviser to reach an opinion there may be delays in the process, and that there was also the matter of the Young judgment which was outside of NHS BSA's control.

52. However, having considered the timeline between November 2014 and December 2017, I find there were periods when the application ought to have been handled more efficiently:-

    - The period between January and March 2015, when the medical adviser had the necessary information to reach a view.
    - The 40-day deadline was exceeded at stage one of the IDRP between August and October 2015.
    - The period between January and September 2017.
    - The period between September and December 2017.

53. I have sympathy for NHS BSA in that undoubtedly the Young judgment will have impacted its ability to respond to injury benefits claims, but that does not entirely negate the distress and inconvenience caused to Ms E by these delays, and I am satisfied that NHS BSA could have acted more quickly over the course of the process as a whole. In the circumstances, I conclude that significant distress and inconvenience was caused to Ms E and the £500 recommended by the Adjudicator is appropriate.

54. Therefore, I partly uphold Ms E's complaint.

Directions

55. Within 21 days of the date of this Determination, NHS BSA shall pay £500 to Ms E in respect of the significant distress and inconvenience she has suffered.

Anthony Arter

Pensions Ombudsman
29 August 2018