PO-21043

Ombudsman's Determination

Applicant	Mr E
Scheme	NHS Injury Benefit Scheme
Respondents	NHS Business Services Authority (**NHS BSA**)

Outcome

1. I do not uphold Mr E'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. Mr E has complained that his application for a permanent injury benefit (**PIB**) has not been considered in a proper manner.

Background information, including submissions from the parties

Background

4. Mr E applied for a PIB in 2014. His claim was in respect of an injury to his knee sustained in August 2012.

5. The relevant regulations are the National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended). As at the date Mr E's employment ceased, regulation 3 provided:

> "(1) Subject to paragraph (3), these Regulations apply to any person who, while he -
>
> (a) is in the paid employment of an employing authority …
>
> (hereinafter referred to in this regulation as "his employment"), 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 …"

6. Regulation 4(1) provided:

> "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 ..."

7. First instance decisions on PIB applications are made by the medical advisers to the Scheme under a delegated authority. At the time of Mr E's application, this was OH Assist. It issued a decision on 7 May 2015, declining Mr E's application on the grounds that he had not suffered an injury which was wholly or mainly attributable to the duties of his NHS employment. A summary of the rationale provided by the OH Assist doctor is provided in the appendix, together with summaries of, and extracts from, other medical evidence relating to Mr E's case.

8. Mr E appealed against the decision under the two-stage internal dispute resolution (**IDR**) procedure. However, at the time of Mr E's appeal, applications for PIB had been put on hold pending the outcome of an appeal case[1] which had gone to the High Court and subsequently went to the Court of Appeal.

9. NHS BSA issued a stage one IDR decision on 10 August 2017. It declined Mr E's appeal on the grounds that, whilst he had suffered an injury which was wholly or mainly attributable to his NHS employment, he had not suffered any permanent loss of earning ability (**PLOEA**) as a result. NHS BSA gave the following reasons for its decision:-

    - It and its medical advisers had to consider Mr E's application against a tightly prescribed set of regulations.
    - It took advice from professionally qualified, experienced, specially trained occupational health doctors who had access to specialist input if required.
    - The criteria for PIB were different to the criteria for state disability benefits.
    - Entitlement to PIB required that two criteria were met:-
        - The applicant had sustained an injury or contracted a disease in the course of their NHS employment and this injury or disease was wholly or mainly attributable to that employment.

[1] *Young v NHS Business Services Authority* [2015] EWHC 2686 (Ch) and *NHS Business Services Authority v Young* [2017] EWCA Civ 8

- The second criterion was that the applicant had suffered a permanent reduction in their earning ability of more than 10% by reason of the injury or disease.

- In order to determine whether the second criterion had been met, it needed to consider whether the injury had been an operative cause of any permanent loss of earning ability. This was what the phrase "by reason of the injury" meant in regulation 4(1).

10. NHS BSA said Mr E's injury had been considered by its medical advisers afresh and it then quoted from the advice it had received (see appendix). NHS BSA accepted that:-

    - Mr E had no problems with his knee prior to August 2012.
    - He was acting fully within his NHS duties when the incident occurred.
    - The incident occurred in accordance with the logged report.
    - He had surgical treatment. The evidence indicated that, by July 2013, his right knee had improved and he could carry out all his contracted duties. He did suffer problems with his right knee at a later date but this was not considered to be an effect of the August 2012 incident.
    - He could no longer carry out his duties as a result of his right knee condition.
    - He had been dismissed on ill health grounds due to his right knee condition.

11. NHS BSA said it was agreed that the August 2012 incident had caused an anterior horn tear of the lateral meniscus of the right knee. It said the operation on the tear had been successful. It said it did not accept that the tear or the operation led to arthritic changes. NHS BSA said its medical adviser was of the opinion that Mr E's right knee problems were a result of pre-existing degenerative changes in his knee which had progressed over time and become symptomatic. It said it saw no reason to disagree with this opinion.

12. Mr E submitted a further appeal. NHS BSA issued a stage two IDR decision on 5 February 2018. It said it had reviewed all the available evidence and had concluded that Mr E had sustained an injury in August 2012, which was wholly or mainly attributable to his NHS employment. NHS BSA said it did not, however, accept that he had suffered a PLOEA of more than 10% by reason of the injury; that is, the injury was not an operative cause of any PLOEA Mr E might be experiencing. NHS BSA quoted from the medical advice it had received (see appendix).

13. NHS BSA said its medical adviser had explained that the evidence demonstrated that Mr E had sustained a tear of the anterior horn of the lateral meniscus of his right knee in August 2012. It said this was wholly or mainly attributable to Mr E's NHS employment. NHS BSA referred to Mr E's claim that he had arthritis as a

consequence of the injury. It said its medical adviser was of the view that it was unlikely that the degenerative changes in Mr E's knee were a consequence of his 2012 injury because there had been insufficient time for the changes to have developed. It said its medical adviser was of the opinion that Mr E had osteoarthritis in his right knee prior to August 2012. It said the medical adviser's opinion was that the 2012 incident had caused Mr E to experience symptoms of osteoarthritis but it was not the whole or main cause of the condition.

14. NHS BSA went on to say that its medical adviser was of the opinion that the meniscal tear injury was not an operative cause of any PLOEA which Mr E had suffered. It said the medical adviser had pointed out that the evidence from March 2013 indicated that there had been a significant improvement in Mr E's knee after surgery. It said the medical adviser had concluded that any PLOEA was entirely due to Mr E's osteoarthritis and not the meniscal injury.

Mr E's position

15. Mr E submits:-

- Prior to the 2012 incident he did not have any absence from work due to arthritic pain or problems with his knee. His GP records show no record of any right knee problems from 2003 to 2012
- Following the incident, he was only allowed to return on light duties. He has provided witness statements which support this.
- Immediately following his operation in 2013, he was absent from work for five months.
- The occupational health report in July 2013 took approximately 20 minutes and did not replicate what would happen in an actual situation.
- He is no longer able to undertake activities which he previously did. For example, he is no longer able to manage a boys' football team or go fellwalking. He is only able to walk on flat smooth surfaces. He is unable to undertake many gardening tasks such as digging up a rootball or digging over a flower bed.
- If it wasn't for the 2012 incident, he would still be able to work for the NHS in a job he loved.
- His consultant orthopaedic surgeon, Mr Sloan, reported that the pain he was experiencing was unlikely to be from arthritis and was due to his operation.
- His employment was terminated on the grounds that he was unable to perform physical interventions. However, NHS BSA now appear to be saying that he can perform these interventions, which is not the case.
- It took a long time for NHS BSA to provide him with a decision.

NHS BSA's position

16. NHS BSA submits:-

- It has correctly considered Mr E's application for a PIB, using the correct test, taking all relevant matters into account and ignoring anything irrelevant. In making its decision, it has sought and accepted the advice of its medical advisers. The fact that it has come to conclusions which differ from Mr E's does not mean that these were conclusions which it could not come to on the facts of the case.
- It has declined Mr E's application for a PIB on the basis that the knee injury on 25 August 2012, is not an operative cause of his PLOEA.
- It can only consider applications on the basis of reliable documentary evidence. Based on the information presented, it has concluded that Mr E's current incapacity for employment is not wholly or mainly attributable to his NHS employment.

Adjudicator's Opinion

17. Mr 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 below:-

- It was not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mr E's eligibility for a PIB. The Ombudsman was primarily concerned with the decision-making process. The issues considered included: whether the relevant regulations had been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision was supported by the available relevant evidence.
- Medical (and other) evidence was reviewed in order to determine whether it supported the decision made. However, the weight which was attached to any of the evidence was for NHS BSA to decide (including giving some of it little or no weight[2]). It was open to NHS BSA to prefer evidence from its own advisers; unless there was a cogent reason why it should not have or should not have without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser. If the decision-making process was found to be flawed, the appropriate course of action was for the decision to be remitted for NHS BSA to reconsider.

[2] *Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

- It was accepted by NHS BSA that Mr E met the conditions set out in regulation 3; that is, he sustained an injury in the course of his NHS employment which was wholly or mainly attributable to that employment. The accepted injury was the anterior horn tear of the lateral meniscus in his right knee.

- NHS BSA had declined Mr E's application on the basis that the accepted injury was not an operative cause of his PLOEA.

- The eligibility conditions for receipt of a PIB were the subject of the *Young* judgment in the Court of Appeal in 2017. Mr E's circumstances were not dissimilar to those of Mrs Young; inasmuch as it was accepted that Mrs Young too had met the regulation 3 conditions. Her application was declined on the grounds that she had not suffered a PLOEA in excess of 10% because the effects of her injury were not permanent. Mrs Young had suffered an injury to her neck and back but had also been suffering from pre-existing degenerative changes in her back. NHS BSA determined that the index event would only have caused temporary soft tissue injury in someone who did not have the same level of degenerative change as Mrs Young. On that basis, it decided that Mrs Young's ongoing incapacity was the result of her pre-existing degenerative changes which were not wholly or mainly attributable to her NHS employment.

- The argument before the Court of Appeal, and prior to that before the High Court, centred on regulation 4(1). In particular, it centred on the meaning of the phrase "by reason of the injury". The Court of Appeal found that the phrase imported a "but for" test of causation into the regulation; that is, whether the injury was an operative cause of the PLOEA. It was not necessary for the injury to be the operative cause of the PLOEA.

- The Courts recognised that this interpretation gave rise to a potential anomaly; in that an injury which was wholly or mainly attributable to the NHS employment, but only a contributory cause of the PLOEA, would give rise to the entirety of the PIB. However, this anomaly was not found to be sufficient to displace what was considered to be the normal use of the language of regulation 4(1).

- The question for NHS BSA and its medical advisers was, therefore, whether Mr E's 2012 injury was an operative cause of his PLOEA.

- Mr E's application was initially declined by OH Assist on the basis that he had not suffered an injury which was wholly or mainly attributable to his NHS employment. This was on the basis that his right knee problems were wholly or mainly attributable to the degenerative changes, which were not themselves attributable to his NHS employment. This decision was taken prior to the *Young* judgment.

- Mr E's case was then reviewed under the IDR procedure following the *Young* judgment. NHS BSA now accepted that Mr E's had sustained an injury which was wholly or mainly attributable to his NHS employment; the anterior horn tear of the lateral meniscus in his right knee.

- The IDR decisions issued by NHS BSA and the medical advice on which they were based make reference to the question of whether or not the injury was an operative cause of his PLOEA. At stage one, the OH Assist doctor noted that Mr E had been reported to have made a good recovery from surgery in 2013. He noted that Mr E had been found fit for physical intervention activities and that he had returned to work. The OH Assist doctor did not agree that Mr E had developed arthritic changes as a result of the 2012 injury. He noted that degenerative changes had been detected in 2012 and that Mr E's pain had recurred eight months after his surgery. He referred to studies which had shown that very mild evidence of early arthritic changes could be seen on x-rays 12-15 years after partial meniscus removal. The OH Assist doctor thought that Mr E's knee pain was highly unlikely to be as a result of arthritic changes secondary to the partial meniscectomy.

- At stage two of the IDR process, the OH Assist doctor agreed that Mr E had sustained an injury which was wholly or mainly attributable to his NHS employment; the meniscal tear. He went on to note that the meniscal tear was not the only pathology found in Mr E's right knee. He referred to the degenerative changes found on the 2012 scan. The OH Assist doctor gave two main reasons for his view that the changes were not a result of the meniscal tear: that such changes took time to develop; and that they were least severe in the lateral compartment where the tear had occurred. With regard to a PLOEA of more than 10%, the OH Assist doctor gave the following reasons for concluding that the meniscal tear was not an operative cause of Mr E's PLOEA: he had recovered well from the surgery in 2013; and his symptoms were not those associated with meniscal pathology.

- The Adjudicator acknowledged that Mr E did not agree with the opinions given by the OH Assist doctors. In particular, he had pointed out that he did not have any knee pain prior to the 2012 incident. He had also pointed out that he returned to work after his surgery on light duties only. This was supported by his witness statements.

- The OH Assist doctors had acknowledged that Mr E had not been experiencing pain in his right knee prior to the 2012 incident. However, they were of the view that his ongoing pain was the result of degenerative changes which had become symptomatic; as had been predicted by Mr Sloan.

- In the *Young* case, the Courts acknowledged that it was possible, even for Mrs Young, that the injury might have had no permanent or lasting effect. It was considered possible that the lasting and permanent effect on Mrs Young's

earning ability might be entirely attributable to her degenerative condition. In which case, Mrs Young's injury would not have been an operative cause of her PLOEA. The Courts found that this had yet to be established in her case because NHS BSA and its medical advisers had not asked the correct statutory question required by regulation 4(1). It did mean, however, that the advice offered and the decision reached in Mr E's case was a possible outcome within the parameters of regulation 4(1).

- The evidence indicated that NHS BSA and its medical adviser had asked the correct question at stages one and two of the IDR procedure; namely, whether or not Mr E's 2012 injury was an operative cause of his PLOEA. The advice from the OH Assist doctors was that Mr E had made a good recovery from his injury and subsequent surgery, and that his PLOEA was caused by degenerative changes in his knee, which were not the result of the injury. They gave reasoned explanations for their conclusions. Whilst Mr E disagreed with those conclusions and had provided his reasons for doing so, a difference of opinion (even between doctors) was not usually sufficient to find that it was maladministration for NHS BSA to accept the opinions of its own medical advisers.

18. Mr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr E for completeness.

Ombudsman's decision

19. In order to qualify for an injury benefit, Mr E must meet the requirements of regulations 3 and 4(1). NHS BSA has accepted that Mr E meets the requirements of regulation 3. That is, he has suffered an injury which is wholly or mainly attributable to his NHS employment. The injury in question is the anterior horn tear of the lateral meniscus in his right knee.

20. The next question to be decided was whether Mr E's earning ability had been permanently reduced by more than 10 per cent **by reason of that injury**. In other words, it was not simply a question of deciding whether or not Mr E's earning ability had been reduced by more than 10 per cent. Regulation 4(1) required a decision as to whether Mr E's earning ability had been reduced because of the meniscal tear in his right knee.

21. That question was for NHS BSA to decide.

22. I note that Mr E's case was delayed by the *Young* court cases. As a result, it took much longer for NHS BSA to provide him with a decision than would normally be considered acceptable. However, it was appropriate for NHS BSA to await the outcome of the court case and I do not find that the delay amounts to maladministration on its part.

23. The *Young* case provided clarification as to what was required by regulation 4(1). Previously, it was thought that, if a person had an underlying degenerative disease which contributed to their PLOEA, they could not qualify for an injury benefit. This was thought to be the case even if it was accepted that the person had suffered a qualifying injury under regulation 3. The courts determined that a qualifying injury did not have to be the only cause of a PLOEA; it could be one of the causes.

24. In Mr E's case, he has pointed out that his employment was ceased because he was considered unable to perform physical interventions. He believes NHS BSA is now saying that he is capable of these interventions. I do not take NHS BSA to be saying that Mr E is now capable of performing the interventions in question. Rather, NHS BSA takes to view that Mr E's qualifying injury is not a contributing cause of his inability to perform the interventions. It accepts that he suffered the injury. However, acting on advice from OH Assist, it considers that the effects of the injury are no longer contributing to his inability to perform the interventions in question. It considers Mr E's inability to perform the interventions now to be caused by degenerative changes in his knee.

25. So far as their medical opinions are concerned, the OH Assist doctors do not come within my jurisdiction. My concern is with the decision-making process undertaken by NHS BSA. As a layperson, I am not in a position to disagree with the OH Assist doctors' medical views. However, I can consider whether their advice addresses the questions which NHS BSA needed to ask under regulations 3 and 4(1).

26. The OH Assist doctors advised NHS BSA that Mr E had undergone surgery for the meniscal tear and made a good recovery. They said degenerative changes had been noted in Mr E's knee at the time of the surgery. The OH Assist doctors were of the view that Mr E's current problems with his knee were caused by these degenerative changes. They did not think that the degenerative changes had been caused by the meniscal tear or by the subsequent surgery. The third OH Assist doctor pointed out that the degenerative changes were least severe in the lateral compartment of Mr E's knee where the meniscus had been torn. The OH Assist doctors advised NHS BSA that Mr E's meniscal tear was not a contributory cause of his PLOEA.

27. The advice offered by the OH Assist doctors addressed the question NHS BSA was required to ask under regulations 3 and 4(1). In addition, it does not appear to be inconsistent with the information from Dr Sloan. I see no reason why NHS BSA should not have relied on the advice from OH Assist in making its decision about Mr E's claim for injury benefit.

28. I acknowledge that Mr E's employment ceased because he was unable to perform the physical interventions his role required and that this continues to be the case. However, the advice NHS BSA received was that this was not as a result of the injury he received in 2012. It is for this reason that it has not awarded Mr E an injury benefit. I do not find that this was maladministration on its part.

29. I realise that it will be disappointing for Mr E but I do not uphold his complaint.

Anthony Arter

Pensions Ombudsman
17 April 2019

Appendix

Medical evidence

30. We have been provided with copies of various medical records relating to Mr E's case. In addition to those summarised below, we have been provided with Mr E's GP records from 7 September 2012 to 10 April 2015, the physical intervention assessment forms dated 2 July 2013 and 17 June 2014, and Mr E's application for fostering.

Dr Sloan, 25 March 2013

31. In a letter to Mr E's GP, Mr Sloan said Mr E had been seen six weeks after his arthroscopy. He said, at the time of the surgery, Mr E had been noted to have some grade 2 changes in the patellofemoral joint with some mild synovitis and some grade 2 changes medially. He said Mr E had some very mild changes laterally and an anterior horn tear which had been resected on the lateral side to a stable rim. Mr Sloan went on to say:

> "Post operatively, [Mr E] tells me he has had significant symptom improvement and is very pleased with the results of surgery. His portals have healed well and he has a good range of movement. He has very occasional discomfort if he has had a lot of exertion on it, but otherwise feels he is doing well.
>
> I have explained the arthroscopy findings and that he has some early degenerative change in his knee which may give him some symptoms over time …"

OH Assist, 7 May 2015

32. On the question of attribution, the OH Assist doctor said:

> "It is considered that the evidence shows that this applicant sustained a right knee injury during the claimed work incident on 25/08/12. The contemporaneous evidence shows that he already had established degenerative or wear and tear change in that knee at the time of this injury.
>
> This degenerative change is not wholly or mainly attributable to the duties of the NHS employment.
>
> Some of the meniscal dysfunction findings are likely to be due to degenerative changes, but on balance it is considered that, but for the claimed accident he would not have required arthroscopy and partial meniscectomy in February 2013. The anterior lateral meniscus damage is considered to be wholly or mainly attributable to the duties of the NHS employment. These were corrected by surgery.
>
> The relevant meniscal damage was corrected by surgery in February 2013, such that the applicant was found capable of his work including intervention

> measures. It is considered that subsequent right knee problems are wholly or mainly attributable to the pre-existing degenerative change (which is not attributable to the duties of the NHS employment at all). It is noted that his terminal absence commenced contemporaneously with his diagnosis of (curable) bladder cancer and in the context of other unrelated health issues. It is also noted that his right [knee] symptoms have been reported as significant for ill health retirement purposes and as occasional swelling/aches without impact on function for foster carer application purposes.
>
> It is not accepted that this applicant's current claimed right knee symptoms are wholly or mainly attributable to the duties of the NHS employment."

33. The doctor went on to say that, since there was no relevant attributable condition, there could be no relevant permanent loss of earning ability.

Mr Sloan, 22 October 2015

34. In a letter to OH Assist, Mr Sloan said Mr E had last attended his out-patient clinic in March 2013. He said Mr E had undergone an arthroscopy and partial lateral meniscectomy six weeks previously. Mr Sloan said:

> "At that time I did explain to [Mr E] that resulting from his previous injury coupled with degenerative change that he may experience deteriorating symptoms over time."

35. Mr Sloan went on to say that, because of the elapse of time since he had last seen Mr E, he was unable to answer OH Assist's questions.

OH Assist, 10 August 2017

36. The OH Assist doctor stated that the evidence indicated that Mr E had sustained an anterior horn tear of the lateral meniscus in his right knee. He agreed that this injury had been sustained in the course of Mr E's NHS employment and was wholly or mainly attributable to his employment. He said there was no reference to any previous injury to Mr E's right knee or to any problems with his right knee prior to the injury in August 2012.

37. The OH Assist doctor referred to a review by a consultant orthopaedic surgeon, Mr Sloan, on 25 March 2013. Mr Sloan had said that, at the time of his surgery, Mr E was noted to have some grade 2 changes in the patellofemoral joint with some mild synovitis and some grade 2 changes medially. He had some very mild changes laterally and an anterior horn tear which had been resected on the lateral side to a stable rim. The OH Assist doctor went on to say:

> "The MRI scan and subsequent findings during surgery showed that [Mr E] had pre-existing degenerative changes in his right knee joint. However, given the nature of the injury and the forces involved and the immediate onset of pain, then it is considered, on the balance of probability, that the anterior horn

tear of the lateral meniscus of the right knee was wholly or mainly attributable to the index incident on 25/8/12 and would have occurred regardless of the presence of pre-existing degenerative changes."

38. The OH Assist doctor went on to say that the injury was not an operative cause of PLOEA for the purposes of regulation 4(1). He noted that, post-operatively, Mr E had been reported as saying he had significant symptom improvement and was very pleased with the results of the surgery. He noted that Mr Sloan had explained that the arthroscopy had shown some early degenerative changes in Mr E's knee which might give him symptoms over time. The OH Assist doctor said Mr E had undergone a physical intervention assessment on 2 July 2013 and was found fit to take part in physical intervention training sessions and physical intervention activities within his contractual duties.

39. The OH Assist doctor noted that Mr E next attended his GP in February 2014 and a physical intervention assessment in June 2014 had found he was not fit to take part in physical intervention activities because of his right knee. He noted that Mr E had applied for ill health retirement and had been awarded Tier 1 benefits in January 2015.

40. The OH Assist doctor accepted that Mr E had sustained trauma to his right knee resulting in an anterior tear to the lateral meniscus. He said this was wholly or mainly attributable to Mr E's NHS employment. He went on to say that the evidence showed that Mr E had made a good recovery from surgery, had returned to work and was able to carry out physical interventions. He said an MRI and arthroscopy had shown Mr E to have degenerative changes which Mr Sloan had advised may cause him problems in the future. The OH Assist doctor quoted from the letter, dated 22 October 2015, from Mr Sloan in which he had said:

"… at the time I did explain to [Mr E] that resulting from his previous injury coupled with degenerative change, that he may experience deteriorating symptoms over time."

41. The OH Assist doctor concluded:

"The evidence indicates that [Mr E] had a successful operation on his right knee. He made a good recovery and returned to work. [Mr E] claims that he has developed arthritic changes as a result of the lateral meniscus tear and operation. However, several studies have shown that very mild evidence of early arthritic changes can be seen on x-rays 12-15 years after partial meniscus removal but patients do not tend to have disabling symptoms … As [Mr E's] right knee pain recurred approximately 8 months after the partial meniscectomy then the pain is highly unlikely to be as a result of arthritic changes secondary to the partial meniscectomy.

We know that [Mr E] was found to have degenerative changes in his right knee at the time of his surgery. These changes were coincidental as [Mr E]

had not experienced any knee pain prior to the index incident. However, Mr Sloan advised that these changes may result in problems in the future, which now appears to be the case.

In summary, I agree with the previous medical adviser that the attributable meniscal damage was corrected by surgery in February 2013 such that the applicant was found capable of work including physical intervention measures. Therefore, the attributable condition cannot be claimed to be an operative cause of PLOEA. [Mr E's] subsequent right knee problems and inability to carry out his NHS duties are a result of pre-existing degenerative changes in the knee which have progressed over time and become symptomatic as previously anticipated."

OH Assist, 5 February 2018

42. The OH Assist doctor agreed that Mr E had sustained an injury which was wholly or mainly attributable to his NHS employment. He said there was no doubt that the incident on 25 August 2012 had taken place. He noted there was a close temporal relationship between the incident and the onset of Mr E's symptoms. He noted that there was no indication that there were any other factors which had contributed to Mr E's meniscal tear. He said, given Mr E's age, it would not be surprising if he had some degenerative changes in the meniscus which increased his susceptibility to this type of injury. However, he said the close temporal relationship between the incident and the onset of symptoms suggested the tear had occurred at the time of the incident and would not have occurred at that time but for the incident.

43. The OH Assist doctor said that the meniscal tear was not the only pathology in Mr E's right knee. He noted that degenerative changes had been found in all three compartments of the knee at the time of the arthroscopy in 2013 and some degenerative changes had been noted on imaging of the knee in 2012. The OH Assist doctor said arthritic changes such as these usually developed over a prolonged period of time. He expressed the view that they were unlikely to be a consequence of the incident in 2012 because there had only been an interval of three months between the incident and the imaging. He said he was also conscious that the degenerative changes were least severe in the lateral compartment of Mr E's knee where the meniscus had been torn. He noted that the changes were greatest in the medial compartment of Mr E's knee and said this was where the weight of the body was usually borne. He suggested that this was also evidence against the 2012 incident being the cause of the arthritic changes in Mr E's knee.

44. The OH Assist doctor commented that osteoarthritis was a common condition and many factors were associated with its development. He said he thought it unlikely that the arthritis in Mr E's right knee was a consequence of the 2012 incident. He said he also thought it unlikely that it was wholly or mainly attributable to the cumulative effect of Mr E's employment. The OH Assist doctor suggested that the most likely scenario was that Mr E had osteoarthritis in his right knee before the 2012 incident which was asymptomatic. He suggested that Mr E had first experienced symptoms as a result of

the incident. He said it was his understanding that the regulations excluded exacerbation of a pre-existing condition.

45. With regard to the PLOEA, the OH Assist doctor said he thought it unlikely that Mr E had suffered a PLOEA of more than 10% as a result of his 2012 injury. He acknowledged that Mr E might have had ongoing symptoms following the incident but noted that Mr Sloan had reported significant improvement following surgery. He noted a physiotherapy report from July 2013 had documented no impairment of functional capability in Mr E's right knee. He noted an entry in the GP notes from November 2014 which said Mr E experienced occasional swelling and pain, but this did not restrict his exercise or activity.

46. The OH Assist doctor noted that Mr E continued to experience pain in his right knee but that there was no evidence of locking or giving way. He said the latter symptoms were commonly associated with meniscal pathology and it was likely that the surgery had relieved those symptoms associated with the meniscal tear. He suggested that Mr E's residual symptoms were the result of his arthritis.