

Ombudsman's Determination

Applicant	Mr H
Scheme	NHS Injury Benefits Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Mr H'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 H's complaint concern's NHS BSA's decision to decline his application for Permanent Injury Benefits (**PIB**).

Background information, including submissions from the parties

4. In October 2013, Mr H applied for PIB on the grounds that he suffered a permanent loss of earning ability (**PLOEA**) when he injured his back on more than one occasion whilst carrying out the duties of his NHS employment. Section 8 of the AW13 PIB application form detailed the injury for which Mr H had claimed PIB. Mr H had said:

"I am claiming for a chronic back pain and loss of feeling in left leg. Specifically, L5/S1 disc bulge and lower lumbar facet joint with Paraspinal muscle wasting. Possible left L5 nerve irritation."
5. On section 9 of the form where the applicant is required to provide details of the incident or events giving rise to their injury or disease Mr H said "whilst lifting a patient....my back went into spasm and I was unable to work without intense pain. Subsequently I was carrying a heavy resuscitation bag through a confined space and twisted which caused my back to go into spasm."
6. On 9 March 2017, this office held that Mr H's PIB application should be remitted back to NHS BSA to be reconsidered in light of the Young v NHS BSA judgement.
7. On 20 June 2017, NHS BSA reconsidered Mr H's application as a full and fresh review and held that Mr H did experience temporary exacerbation of pain symptoms

whilst carrying out the duties of his NHS employment therefore these symptoms occurred in the course of his employment, however Mr H had been suffering symptoms such as these prior to the claimed injuries therefore the pain was not considered to be wholly or mainly attributable to the duties of his NHS employment. NHS BSA noted that as part of Mr H's initial PIB application decision on 20 January 2014, he was informed that there had been an injury that was wholly or mainly attributable to his NHS employment however there had been no PLOEA. However, the MA had considered the medical evidence for the purposes of this full and fresh review and had not reached the same conclusions. It was held that the claimed back injury and loss of feeling in leg symptoms were not shown to be wholly or mainly attributable to Mr H's employment.

8. On 18 July 2017, Mr H appealed the decision made by NHS BSA. His appeal was dealt with by NHS BSA under stage 1 of the Scheme's Internal Dispute Resolution Procedure (**IDRP**).
9. On 25 September 2017, NHS BSA issued its stage 1 IDRP response to Mr H. NHS BSA referred the matter to a new MA, who took into account all previous evidence on Mr H's file, including: referral documents; his GP records; reports from Dr Abrahams, Consultant in Pain Medicine dated 7 June 2012, 26 September 2012, 15 March 2013 and 20 August 2013; report from Extended Scope Practitioner Fletcher dated 25 January 2012; report from Physiotherapist Hawkey dated 4 January 2012; Physiotherapy discharge report dated 19 September 2011 and report from Dr Williams, Consultant Occupational Physician, on Form AW33E dated 5 July 2013. The MA was of the opinion that Mr H's claimed injury/disease was not wholly or mainly attributable to his NHS employment prior to 31 March 2013.
10. The MA noted that the medical evidence showed Mr H did experience back pain on a number of occasions whilst at work, however it is unlikely that the bulge in Mr H's back is as a result of the incidents described. He also thought it is unlikely that they are the result of some cumulative effect of Mr H's employment. The MA said there is no suggestion in the medical notes that Mr H had experienced any spinal trauma in the course of his NHS employment but it was his opinion that the most likely explanation for Mr H's intervertebral disc changes and facet joint changes is that these changes are the result of genetically determined disc degeneration that has been modified to some degree by behavioural and environmental factors. Based on this NHS BSA did not uphold Mr H's PIB application.
11. On 5 February 2018, Mr H appealed under stage 2 of the IDRP.
12. On 1 May 2018, NHS BSA issued its stage 2 IDRP response to Mr H. NHS BSA referred the matter to a new MA who took into account all previous evidence as no further evidence was submitted by Mr H. The MA concluded that Mr H's claimed injury/disease is not wholly or mainly attributable to his NHS employment prior to 31 March 2013. The MA accepted that Mr H has a disease in the form of changes in his L5/S1 intervertebral disc and facet joint changes as evidenced in Dr Abrahams report. The MA said, "there was no clear dose-response relationship between the amount of

physical loading and degenerative disc disease seen. If it was felt that heavy load and physical lifting led to degenerative disc disease then it would be expected that individuals who undertook such work would be seen with more advanced degenerative changes than those who did not undertake such heavy physical lifting and loading of the spine. This is not the case.” It was therefore his opinion that it is unlikely that Mr H’s disease of changes in his intervertebral disc and facet joint changes are the result of the incidents described as occurring within the work place. It is also his opinion that Mr H’s degenerative condition is not wholly or mainly attributable to the nature of his NHS duties over the period of his NHS employment.

13. The MA agreed with the previous MA that the most likely explanation for Mr H’s disease is the result of genetically determined disc degeneration that has been modified to some degree by behavioural and environmental factors. Based on this NHS BSA held that the evidence shows although Mr H’s degenerative back disease became symptomatic in the course of his NHS employment, this was not the same as sustaining an injury wholly or mainly due to his NHS employment, therefore attribution was not accepted.

Adjudicator’s Opinion

14. Mr H’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 Ombudsman’s role is not to decide whether Mr H was eligible for PIB; that was a matter for NHS BSA to decide after obtaining requisite certification from an appropriate MA. Nor is it for the Ombudsman to agree or disagree with any medical opinion.
 - The Ombudsman’s role is to decide whether NHS BSA had abided by the Regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. If there were flaws in the decision-making process, the Ombudsman could require NHS BSA to look at Mr H’s case again. However, the weight attached to any of the evidence was for NHS BSA to decide, including giving some of it little or no weight. It was also open to NHS BSA to prefer the advice of its own medical advisers unless there was a cogent reason why it should not.
 - Mr H says NHS BSA failed to consider all relevant evidence regarding his injury. However, there was a difference between ignoring evidence and considering evidence but attaching little or no weight to it. It was for NHS BSA to apportion weight (if any) to the relevant medical evidence as it saw fit. NHS BSA had made its decision based on the MA’s report, and the Adjudicator could see that the report referred to all relevant medical evidence. As such, she was satisfied that NHS BSA had considered all the relevant information.

- The Adjudicator was satisfied that the MA considered all the relevant medical evidence when making his assessment, so there has been no error or omission of fact in NHS BSA's reasoning (i.e. it did not misconstrue the Scheme's criteria for the award of PIB). Further, NHS BSA has given the reason for its opinion to not award Mr H PIB and consequently it was reasonable (that is, not perverse) for NHS BSA to decide to turn down his PIB application.
15. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H provided his 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 Mr H for completeness.

Ombudsman's decision

16. Mr H said that NHS BSA had decided on two different outcomes when given the same medical evidence. NHS BSA's initial decision on 20 January 2014 differed from its decision on 20 June 2017. However, I find that the MA's report of 20 June 2017 provided NHS BSA with a comprehensive opinion, allowing it to reach an informed decision. There is no sign that it failed to review Mr H's concerns or condition properly. Further, both MA's at stage 1 and 2 of the appeal process also reached the same conclusion. I appreciate that Mr H disagrees with NHS BSA's decision not to grant him PIB. However, Mr H's disagreement is not a sufficient reason for me to remit the matter back to NHS BSA for his application to be reconsidered.
17. I find, based on the evidence that has been presented, that NHS BSA has considered the relevant factors in arriving at its decision not to grant Mr H's PIB. I do not consider that there are justifiable grounds for me to find that the process NHS BSA undertook in reaching its decision was flawed.
18. Therefore, I do not uphold Mr H's complaint.

Karen Johnston

Deputy Pensions Ombudsman
20 May 2019