

Ombudsman's Determination

Applicant	Ms I
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Ms I's complaint and no further action is required by NHS BSA

Complaint summary

2. Ms I is unhappy that her application for Permanent Injury Benefit (**PIB**) was not accepted by NHS BSA.

Background information, including submissions from the parties

3. In 2016, Ms I completed and submitted an application form for PIB, asking that payments be backdated to 2013, when she left her NHS employment. On this form, in response to the question 'Please tell us what injury or disease, that has arisen out of your NHS work, you are claiming for', Ms I wrote, "Please use the information you already hold."
4. NHS BSA used Ms I's response to the same question from a 2010 application to the Scheme. In that form, Ms I had written:

"Anxiety + depression; lack of concentration, forgetfulness; generalised anxiety disorder, suffering from post traumatic state resulting in severe anxiety and phobic problems; heart palpitations + panic attacks due to anxiety/stress. The above injuries/illnesses are due to bullying/ harassment/ victimisation/ discrimination and overwork and many traumas whilst on duty / regarding work issues. My medication also gives me side effects for example; dry mouth, nausea, loss of libido, fatigue."
5. The NHS Injury Benefits Regulations 1995 (**the Regulations**), state that, in order for entitlement to PIB to be granted, NHS BSA must be satisfied that the member meets the following two criteria:-

- The member must be suffering from an injury or disease which is wholly or mainly attributable to their NHS employment;
- and
- The member must have suffered a permanent loss of earning ability (**PLOEA**) of more than 10%.

6. On 6 December 2016, the Scheme medical adviser issued its decision letter on Ms I's PIB application. The medical adviser concluded that Ms I's injury, namely her 'perceived work related stress', was 'contracted in the course of her NHS employment' and was 'wholly or mainly attributable to that NHS employment'. However, the medical adviser did not agree that Ms I's condition had caused a PLOEA of more than 10%. As a result, Ms I's application for PIB was not accepted.
7. Ms I challenged the decision and asked NHS BSA to consider the complaint under stage 1 of its internal dispute resolution procedure (**IDRP**). On 8 August 2017, NHS BSA issued its stage 1 IDR decision. A second medical adviser considered Ms I's case and agreed her injury was wholly or mainly attributable to her NHS employment, but had not caused any PLOEA. This Scheme medical adviser said:

"Considering only the impact of generalised anxiety and depression the medical evidence is consistent with [Ms I] being fit to work in the role of a full time community nurse, for any other NHS employer prior to the age of 65. In order to achieve this, she requires to learn how to stop ruminating about her feelings of past injustice. This is achievable should she wish to do so, over a course of a few months at most, assisted by further CBT to enable her to focus on the positive benefits of her past work, where she utilised her caring skills to improve the lives of patients in the community, mindfulness to help her focus on her current situation and techniques to enable her to manage negative work related thoughts. The weight gain is noted: the GP records indicate body mass index of 40.8 on 1/10/14. This is likely to be of multi-factorial origin, arising due to immobility from arthritis of both knees, constitutional (inherited) factors and her general psychological state, including the impact of non-work stressors. It is not accepted that weight gain arises wholly or mainly from work factors and the impact of this upon earnings ability has not been considered.

It is noted that there are stressors in [Ms I's] personal environment, including illness in the family, which are likely to be impacting adversely upon her psychological wellbeing. It is also noted that the applicant's letter of 18th May 2017 indicates she has arthritis: the impact of this condition upon permanent loss of earnings has not been considered because this has not been attributed to her NHS employment. However it is likely that the pain and poor physical function associated with this condition is also significantly contributing to her continued low mood and anxiety symptoms, because physical and mental wellbeing are inextricably linked."

8. The stage 1 IDRП letter further said:

“In assessing any PLOEA the medical adviser has identified alternative employment that they consider that you are likely to be able to undertake before reaching retirement age, and they have compared the potential income from that with the income that you were receiving prior to leaving your NHS post. They have considered your ability to work across the whole of the general field of employment, not just within your previous NHS role or the NHS in general. When considering alternative employment, the availability of such employment or your willingness to accept such type of employment cannot be considered. They must also consider your ability to engage in employment to age 65, taking into account your age, intellectual and academic ability, qualifications and experience.”

9. Unhappy with the outcome, Ms I appealed the decision. On 28 March 2018, NHS BSA issued its stage 2 IDRП decision letter. Among other things, this letter said:

“The medical adviser advises that they are not able to recommend that your depression and anxiety is wholly or mainly attributable to your NHS employment because; although the claimed events may have triggered or exacerbated symptoms of psychological ill-health, this is not the same as saying that they are the whole or main cause of the ill-health. It is more likely than not that your depression and anxiety is wholly or mainly attributable to genetic factors. The medical adviser goes on to say that he understands that this recommendation doesn't agree with the previous independent medical advisers' opinions that there had been an injury that was wholly or mainly attributable to your NHS employment; however this is known to happen, as with any independent assessment each adviser makes their own recommendations based on the medical evidence that they are presented with.”

10. Unhappy with this response, Ms I referred her complaint to the Pensions Ombudsman. In her application, Ms I made the following points:-

- NHS accepted her application for temporary injury allowance (**TIA**) so it should also accept her PIB application.
- The second medical adviser did not request further evidence from Ms I's GP.
- An Occupational Health (**OH**) report, dated 13 August 2018, was not considered by the Scheme medical adviser.

Adjudicator's Opinion

11. Ms I'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 is for NHS BSA to decide what medical evidence it needs and subsequently considers.
 - NHS BSA has shown that it considered multiple forms of evidence, including OH reports; documentation from Ms I's TIA and ill health retirement applications; letters from Ms I's Cognitive and Behavioural Psychotherapist; GP records; and information from Ms I and her former employer.
 - The medical adviser specifically referenced the OH report of 13 August 2018, which Ms I believes it did not review.
 - The criteria for entitlement to TIA is different from and independent of entitlement to PIB.
 - NHS BSA considered relevant evidence and the process it undertook in arriving at its decision was reasonable.
12. Ms I did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms I 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 Ms I for completeness.

Summary of Ms I's position

13. Ms I has said that the second medical adviser did not request further evidence from Ms I's GP when considering her PIB application.
14. The advice from the Scheme's medical advisers is flawed as they are not mental health experts.
15. There is no evidence that Ms I's mental and physical health issues are genetic.
16. Ms I's applications for TIA were accepted on four occasions, which means NHS BSA previously decided that Ms I's injury was wholly or mainly attributable to her NHS role and the 'operative cause of a PLOEA'.
17. The Scheme medical adviser was wrong to say that her musculoskeletal injuries were not caused by her NHS employment (and so would not be considered). Ms I argues that these physical health issues were caused by regular kneeling within her NHS role.
18. NHS BSA is wrong to say Ms I's PIB application was based on her 'work related stress'.

19. Ms I describes several events that took place at work, including scenarios within her working days involving former colleagues and senior staff.
20. Ms I was not offered a risk assessment during her NHS employment, until her final day.
21. Ms I considers she is disabled under 'The Equality Act 2012', which 'incorporates the effects of an accumulative impairment such as depression'.
22. NHS BSA has incorrectly quoted elements of her TIA application when referring to her PIB application, in particular she believes the page dated 2010 (**the 2010 page**) has been falsely added by NHS BSA.

Ombudsman's decision

23. The Regulations provide for payment of PIB where a member has sustained an injury or contracted a disease which is 'wholly or mainly attributable' to the duties of their NHS employment. In accordance with the Regulations, it is then necessary to consider whether the member has suffered a PLOEA of more than 10% as a result of the injury or disease. Permanent means to retirement age, which is 65 in Ms I's case,
24. It is not for the Pensions Ombudsman to comment on the medical opinions or make a decision on Ms I's eligibility for payment of PIB benefits under the Scheme. What I am able to consider is the decision-making process. 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 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 clear reason why it should not. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser. There is no evidence that either of these has occurred in this case.
25. Ms I has challenged the qualification of the Scheme medical advisers to be able to consider mental health issues. It is for each medical adviser to decide what relevant information it requires. NHS BSA has shown that its medical advisers considered multiple forms of evidence, including OH reports; documentation from Ms I's TIA application and ill health retirement application; letters from Ms I's Cognitive and Behavioural Psychotherapist; GP records; and information from Ms I and her former employer. I find that the Scheme medical advisers have considered relevant information in consideration of Ms I's work related stress injury, and that NHS BSA reached a reasonable decision based on the advice of its medical advisers.
26. Ms I claims the 2010 page (see paragraph 22 above) has been falsely added to her PIB application by NHS BSA. Ms I states that this page formed part of one of her applications for TIA. However, on her 2016 PIB application form, Ms I instructed NHS BSA to use the information it already held on file. It is not clear why Ms I now

challenges NHS BSA's use of her previous explanation of the injury for which she was claiming.

27. NHS BSA provided us with its copy of Ms I's PIB application. Within this it included the 2010 page, immediately ahead of the section where Ms I was asked to describe her injury, but instead had written 'Please use the information you already hold'. Ms I has not provided an alternative version of her PIB application in her challenge of its authenticity. I am satisfied that Ms I had the opportunity within the PIB application form to provide more up-to-date information about her conditions but decided not to do so.
28. Ms I has suggested that the injury she claimed for in her PIB application was not 'work related stress', but in fact knee pain. She disputes the second medical adviser's reasons for not considering the knee pain within its review. It is not for me to say that Ms I does not experience knee pain, but the evidence shows that Ms I applied for PIB based on her mental health issues, which she considers to be an injury caused through carrying out the duties of her NHS employment. The evidence shows that her knee pain did not form part of her PIB application and so is not within the remit of this consideration of her entitlement to PIB. The knee pain was therefore correctly disregarded by NHS BSA in this application.
29. Ms I has argued that NHS BSA's acceptance of her claim for TIA means NHS BSA has accepted her claimed injury was wholly or mainly attributable to the duties of her NHS employment, for the purposes of her PIB application. However, the TIA is an award for temporary injury. In the TIA consideration, the medical adviser accepted that Ms I's stress, caused by her perception of work events, was the whole or main cause of a temporary inability to work. This is not the same as the consideration of whether Ms I's work related stress was attributable to a permanent inability to work. The application processes for TIA and PIB are independent and based on different sets of criteria.
30. Ms I has described several incidents that took place during her NHS employment, which she believes contributed to her injury. It is not for me to consider employment complaints, nor is it for me to comment on Ms I's health issues, so I will not consider the arguments Ms I has raised involving these. As explained in paragraph 24, I will consider only the process NHS BSA undertook to reach its decision.
31. I do not find that there has been an administrative error in the way NHS BSA reached its decision on Ms I's PIB application.
32. I do not uphold Ms I's complaint.

Anthony Arter

Pensions Ombudsman
1 October 2019