

**PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN**

Applicant	Mrs Susan Wilczynski
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent(s)	NHS Business Services Authority (NHS BSA)

Subject

Essentially, Mrs Wilczynski's complaint is that she has not been awarded a Permanent Injury Benefit (**PIB**).

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against NHS BSA to the extent that their decision failed to explain to Mrs Wilczynski why they preferred their medical advisers' opinion over specialist opinion.

DETAILED DETERMINATION

Scheme Regulations

1. The Scheme is governed by the National Health Service (Injury Benefits) Regulations 1995 (as amended). As relevant Regulation 3(2) says:

“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; ...”
2. PIB is available where the above criteria are met and the person has consequently suffered a permanent (that is to age 65) loss of earning ability (**PLOEA**) of greater than 10 per cent.

Material Facts

3. Mrs Wilczynski was a Staff Nurse (Theatre / Recovery Practitioner) at Kettering General Hospital NHS Foundation Trust (**the Trust**). On 22 December 2010 she experienced low back pain whilst assisting a morbidly obese patient to sit up in bed (**the index event**). She went on sickness absence from 23 December to 11 January 2011. Following her return to work she experienced further back symptoms exacerbated by pulling a heavy trolley in July 2011 leading to sickness absence from 28 July to 5 December.
4. An Occupational Physician wrote on 2 November that an MRI scan (organised the previous month) had revealed only “wear and tear” changes in Mrs Wilczynski’s spine.
5. Mrs Wilczynski commenced a phased return to work but went on long term sickness absence from 15 December 2011. In January 2012 she was seen by Mr Birch (Consultant Orthopaedic Surgeon). Commenting on the October scan Mr Birch noted in his February report:

“minor degenerative changes of the lower lumbar discs with an annular tear at L4/5 without spinal stenosis. However, there is clear inflammation of the L2/3 facet joints with irregularities of the L3/4 and L4/5 joints. However, the major problem is on the left side at L5/S1 where there is significant arthritis of the facet joint which is really quite different from the right side. Clinically and radiographically, therefore, Mrs Wilczynski

has facet joint inflammation secondary to arthritis in the lower lumbar spine”.

6. Mrs Wilczynski received facet joint injections to try to establish whether the pain was coming from the facet joint arthrosis or the disc lesion. The injections proved of no lasting benefit.
7. In late July /early August 2012 Mrs Wilczynski notified Mr Birch that she had had a serious deterioration of symptoms whilst in Spain (Mrs Wilczynski says this occurred over a number of months). A further MRI scan revealed a tear at L5/S1. Mr Birch decided to operate. In October Mr Birch reported to Occupational Health that post-operatively Mrs Wilczynski had been generally well. Concerning her ability to work Mr Birch said it was highly unlikely that she would be able to resume her previous duties; and as far as her ability to carry out a secondary occupation at the moment it was impossible to say.
8. In February 2013 Mr Birch notified Occupational Health that he could not recommend Mrs Wilczynski's return to any active role within the NHS (as her spinal fusion still had 40 to 50 per cent healing to do) and gave his opinion that it would be reasonable for her to be considered for ill-health retirement.
9. The next month Mrs Wilczynski successfully applied for ill-health retirement and submitted a claim for PIB.
10. In her PIB application Mrs Wilczynski referred to the index event, feeling immediate pain in her lower back and thereafter experiencing a gradual deterioration in her condition until August 2012 when she underwent spinal surgery.
11. Acting on behalf of NHS BSA, the Scheme's Medical Adviser (**Atos**) rejected Mrs Wilczynski's application. A doctor for Atos, amongst other things, said:

“It is considered that, for temporary periods, incapacitating symptoms of her non-attributable degenerative spine condition were mainly attributable to the duties of her NHS employment.

The evidence does not confirm any fresh pathological change for the worse occurred during these incidents. Rather temporary triggering of symptoms of a pre-existing condition occurred.

Over time the main cause of her back related symptoms became her underlying degenerative spinal disease itself.

...

It is considered that this applicant's claimed constant pain and difficulty sitting for more than 15 minutes are not wholly or mainly attributable to the duties of her NHS employment.

As there are no relevant attributable conditions/symptoms there can be no relevant loss of earning ability.

...

It is further considered that improvement on her (non relevant) health issues and function is anticipated over the coming six months or so."

12. Mrs Wilczynski invoked the Scheme's two-stage internal dispute resolution (IDR) procedure. At IDR stage one, amongst other things, she said:
 - she had had no pre-existing symptoms prior to the incident on 22 December 2010;
 - the cause of her back pain was annular tears to L4/5 and L5/S1 discs and not the incidental findings of facet joint arthrosis;
 - the injury and subsequent symptoms were solely attributable to the duties of her NHS employment and minimal improvement of her back pain and function was anticipated. Therefore she had incurred a PLOEA.
13. Mrs Wilczynski included reports from Professor Mulholland (F.R.C.S - Emeritus Consultant Spinal Surgeon and Special Professor in Orthopaedic and Accident Surgery), Mr Birch and her GP.
14. Professor Mulholland said in the 'Opinion' section of his report (prepared for the attention of the Court in respect of a negligence claim that Mrs Wilczynski has brought against the Trust):

"Clearly the stress that Mrs Wilczynski sustained was a very significant one. I accept that there were degenerative changes present prior to this incident. However, the presence of degenerative changes in the adult on MRI scanning is not predictive of future back pain. In view of the fact that she had been doing a very demanding job for some years and had never had any back problem I believe that this back problem was initiated by this accident [the accident on 22 December 2010].

The future is of course somewhat uncertain at present as it is fairly soon after surgery, but she has so far done well, and we know that early success after fusion generally indicates long term success but the degree of success is variable. Probably only some 25% get what can be called an excellent result. In the main 79% of patients are good or excellent. However the recovery process is sometimes slow, and it would be

appropriate for her to be assessed fully in about a year to decide what her long term disability is.”

15. Mr Birch also disagreed with Atos’ opinion (that because Mrs Wilczynski had pre-existing degenerative changes in her spine any symptoms arising from that were not attributable to her NHS employment); amongst other things he said:

“It is well known from epidemiological studies that up to 40% of the population will have significant degenerative changes in the spine but at any one time only a small percentage of people will have symptoms attributable to that. Indeed many patients go through life with degenerative change without ever experiencing back pain.

The reason for you to experience pain in the presence of degenerative change in your lumbar spine were clearly the traumatic events [on 22 December 2010 and in July 2011] that you sustained whilst at work. Had you not sustained those injuries, there is absolutely no evidence that you would have had any symptoms in your back and you therefore would have in all likelihood continued to work until your normal time of retirement. The fact that the injuries were sustained at work and have triggered a significant decline in your spinal function, which ended up in requiring surgery is a matter of record. For a condition to have any relevance in this circumstance it has to have both underlying pathological change and a manifestation in a clinical sense of that pathological change. The changes in your spine were not by definition pathological as they were giving you no symptoms. They are merely an appearance that is common to a large minority of human beings.

...Modern thinking and medicolegal opinion is now very much on the side that if a person has established degenerative changes in the lumbar spine but has no symptoms then there is no inevitability about them going on to have pain. As a result, the symptoms following a traumatic event are a result of that traumatic event not just the fact that they have underlying degenerative changes.”

16. Mrs Wilczynski’s GP gave her opinion that Mrs Wilczynski would not be able to work again.
17. Another medical adviser at Atos (not previously involved), after considering the relevant evidence (including the opinions of Professor Mulholland, Mr Birch and Mrs Wilczynski’s GP) informed NHS BSA:

“The evidence, therefore, is that Mrs Wilczynski has experienced back symptoms triggered by incidents at work, particularly the incident on 22/12/10. On investigation the persistent back symptoms she has been found to have signs of degenerative lumbar spinal / disc disease, as confirmed by the further specialist and GP submissions, and it is therefore likely that this degenerative condition has predated and been present at the time of the index incident.

Mrs Wilczynski has been found to have facet joint arthritis and annular tears at discs. It is known that annular disc tears commonly occur at L4/5 and L5/S1 and most result from the natural aging process and degenerative disease of the disc. Annular tears may be asymptomatic. Repetitive disc stressing activity or more traumatic force may lead to tears in the annulus fibrosus in the presence of degenerative disc disease. It is known that annular tears themselves may contribute to the disc and vertebral degenerative disease process.

Given the MRI findings, it is likely that the index incident in December'10 has triggered symptoms of the pre-existing, underlying, constitutional, and degenerative disc disease. It is advised that it is this condition, itself not caused by her work, which is the main cause for any continuing long-term symptoms and incapacity."

18. NHS BSA accepted the opinion of Atos and turned down Mrs Wilczynski's appeal.
19. Mrs Wilczynski invoked IDR stage two and asked NHS BSA to confirm the qualifications of the Atos medical advisers and their experience in spinal injuries "to more effectively challenge" NHS BSA's decision. No new medical evidence was submitted with her letter.
20. NHS BSA asked for the opinion of another medical adviser (not previously involved) at Atos. After considering the existing evidence and Mrs Wilczynski's letter the medical adviser concluded that whilst Mrs Wilczynski had incurred an injury at work this had not resulted in a PLOEA:

"The question to be asked in this case is what would the consequences have been for a woman of similar age?

It is clear that Mrs Wilczynski had pre-existing degenerative changes in her lumbar spine, these changes are constitutional in origin and unrelated to work; they did not cause any symptoms prior to the incident of 22/12/2010.

Had these constitutional changes not been present it is likely that she would have recovered and returned to work within a short period of time. It is not accepted that the incident of December 2010 was the cause of permanent loss of earnings ability. Symptoms of persisting back pain which have resulted in her retirement from the NHS are considered to be due to congenital and constitutional degenerative changes within the lumbar spine."

21. NHS BSA duly turned down Mrs Wilczynski's final appeal:

- Whilst it was accepted that Mrs Wilczynski had sustained an injury to her back on 22 December 2010 wholly or mainly attributable to her NHS employment it had not resulted in any PLOEA.
- This was because if she had had comparable degenerative changes to a woman of the same age at the time of the index event it could not have caused more than a temporary self-limiting injury and recovery would have been expected in a short time.
- The back condition from which Mrs Wilczynski was now suffering, causing incapacity to work, was a constitutional degenerative condition unconnected to her NHS employment.
- Therefore, taking only into account the effects of the accepted injury and ignoring all other conditions, there was no reason why Mrs Wilczynski could not have returned to her original job earning at the same level that she did previously.
- Whilst a degenerative condition may be permanently or temporarily exacerbated by work activities; that is not the same as saying that the condition is wholly or mainly attributable to their NHS employment.

22. NHS BSA's decision letter included information relating to the qualifications of the Atos medical advisers.

23. After complaining to this office Mrs Wilczynski submitted a further report from Professor Mulholland (again prepared for the attention of the Court in respect of her ongoing negligence claim), who examined Mrs Wilczynski in November 2013. Commenting on the result of her spinal fusion he says:

"There has been amelioration of her symptoms, but unfortunately not sufficient to allow her to return to her job. I believe the accident that she had precipitated the need for surgical procedure, and although there were degenerative changes present before there was no reason to suppose that her back would have failed in the absence of this injury.

I think the situation now will remain as it is. I believe it unlikely that there will be any deterioration, but any improvement would be fairly modest and certainly not sufficient to allow her to return to nursing."

24. NHS BSA asked another Atos medical adviser for their opinion on Mrs Wilczynski's application. He informed NHS BSA:

"Mrs Wilczynski's claim on Form AW13 is for an injury that occurred on 22nd December 2010. She had a pre existing degenerative spine at that time. Her absence lasted three weeks, The MRI scan closest to that index event showed mild degenerative changes.

She had further episodes of pain in July 2011 was referred for treatment for this in early 2012 and finally had a more substantial incident in Spain in 2012. Whilst these subsequent episodes of pain are not the subject of her application one can see a progressive deterioration in the MRI reports as the degenerative changes continue.

Mr Birch in his letter to Mrs Wilczynski dated 21 May writes that without the precipitating factor of what happened at work her problems would not have occurred. That is quite true, but equally any mechanical change in a social or domestic situation would have caused her back to become acute as we see with whatever happened in Spain. The normal duties of her NHS employment are neither wholly or mainly the attributable cause of her degenerative spinal condition, constitutional factors are.

Degenerative changes in the spine are common and start to show up on MRI survey's [sic] from the mid 20's. The changes on MRI do not correlate particularly well with symptoms. Indeed some patients with awful MRI's report hardly any symptoms.

In a person of comparable age, with similar age related degeneration, a similar outcome as in this case would be expected. That is a muscular strain and short absence.

Mrs Wilczynski had a pre-existing asymptomatic degenerative spine prior to her index incident. She recovered from this and returned to work after three weeks. There is no permanent loss of earnings ability attributable to the index incident."

25. NHS BSA say Professor Mulholland's report offers no new medical evidence or opinion:

"It is unfortunate that Mrs Wilczynski takes a differing view; that all of her back problems have been caused by the single incident on 22.12.10 but as our medical adviser has confirmed, episodes of pain subsequent to the index injury are not subject of her application nor linked to her NHS injury. One can clearly see a progressive deterioration in her MRI reports as the constitutional degenerative changes continue.

One cannot automatically conclude that because one single incident (in this case the index event on 22.12.10) resulted in pain, that all subsequent back pain is the result of the index incident, and in this case, on looking at the timeline, we believe that in addition to the work injury, which was self limiting and would have been expected to resolve in time in a normally healthy back, there is a separate constitutional degenerative condition unrelated to work which has been steadily progressing and which is the main cause of Mrs Wilczynski's incapability."

Mrs Wilczynski's position

26. Mrs Wilczynski says:

- NHS BSA's decision is based on flawed medical opinions by Atos medical advisers with no spinal expertise;
- NHS BSA have ignored the reports of two spinal experts and her GP's report that the trauma of the index incident caused her condition and the degenerative change in her spine is incidental and not significant;
- NHS BSA refer to a number of incidents triggering her back complaint, there was only one incident on 22 December 2010 and her symptoms were exacerbated by pulling a trolley in July 2011;
- she has never had any congenital changes;
- there were clear pathological changes occurring at the time of the index incident leading to spinal surgery;
- following surgery she suffers "ongoing severe pain, loss of sensation and reduced function in my left leg, numbness in my right leg and limited movement in her back";
- NHS BSA have failed to provide any reasons or evidence why they disagree with the opinions of the two spinal experts who have reviewed the investigations and examined her and were aware of the criteria for a PIB;
- her application for PIB was also supported by an occupational health specialist at Kettering General Hospital.

NHS BSA's position

27. NHS BSA say:

- they have properly considered Mrs Wilczynski's application, taking into account and weighing all of the relevant evidence and nothing irrelevant;
- they acknowledge that there was a work related incident that caused Mrs Wilczynski pain but her ongoing condition (degenerative disease of the spine) causing the pain and incapability for work is not considered to be related to the incident or attributable to her NHS employment;

- based on the information and diagnosis provided by her treating doctors the conclusion is that Mrs Wilczynski's back problems are of a degenerative and constitutional nature;
- the fact that Mrs Wilczynski 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.

Conclusions

28. I start by saying that my role in this matter is to decide whether NHS BSA have correctly applied the Scheme's Regulations, considered all relevant information and reached a decision which is not perverse. By perverse I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.
29. Regulation 3(2) of the Scheme Regulations applies where an injury sustained or a disease contracted is wholly or mainly attributable to NHS employment and, if that criterion is met, leads to a PLOEA of more than 10 per cent. Answering either question is a finding of fact for NHS BSA to make (or their Medical Advisers under a delegated power – original decision only).
30. Before making their decision at IDR stage one and two NHS BSA are required to consider all of the relevant medical evidence and to decide what weight (if any) to attach to it. Consequently, they may prefer the opinion of their Medical Advisers to that of Mrs Wilczynski's doctors provided there is no reason why they should not (such as an error or omission of fact or misunderstanding of the eligibility criteria).
31. Whilst it is not disputed that Mrs Wilczynski had a degenerative spinal condition, the two specialists are of the opinion that Mrs Wilczynski's back problem was initiated by the index event (resulting in annular tears to discs L4/5 and L5/S1) and that if the event had not occurred it is likely that she would have continued working until her normal retirement age. But NHS BSA have accepted the opinion of Atos that whilst Mrs Wilczynski satisfies the first part of the two-part test (that is she injured her back at work) she fails the second part on the grounds that her ongoing pain is attributable to the constitutional degenerative condition of her spine (which the 2010 injury temporarily exacerbated) and not wholly or mainly attributable to her NHS employment.

32. Both specialists examined Mrs Wilczynski (Mr Birch is one of her treating doctors and operated on her spine) – Atos did not. However, it is not clear whether the specialists and Mrs Wilczynski's GP were aware of the criteria for a PIB (albeit Mrs Wilczynski says the specialists were aware) when giving their respective opinions (and Professor Mulholland's medical reports were prepared for a separate purpose).
33. Mrs Wilczynski says the reports from Professor Mulholland and Mr Birch have been ignored by NHS BSA. There is a fundamental difference between ignoring relevant evidence and considering such evidence but attaching little or no weight to it. The reports from both specialists were considered in Atos' respective reports to NHS BSA at IDR stage one and two. I therefore do not think that Mrs Wilczynski is right to say that NHS BSA have ignored the opinion of either specialist.
34. At IDR stage two Mrs Wilczynski asked NHS BSA to confirm the qualifications of the Atos medical advisers and their experience in spinal injuries "to more effectively challenge" NHS BSA's IDR stage one decision. NHS BSA's response was incorporated in their IDR stage two decision letter. This denied Mrs Wilczynski the opportunity to supplement her appeal.
35. In preferring the opinion of Atos over specialist opinion the Authority needed to give Mrs Wilczynski their reasons. To be able to do that NHS BSA firstly needed to understand why Atos disagreed with the opinions of Mr Birch and Professor Mulholland over the causation of Mrs Wilczynski's back condition. However, NHS BSA do not appear to have sought an explanation from Atos and their decisions (at IDR stage one and two) did not explain to Mrs Wilczynski why they had accepted Atos opinion. Without that reasoning, Mrs Wilczynski was not in a position to understand NHS BSA's decision and either accept it or reject it and fully prepare her appeal.
36. Put simply, NHS BSA must have a reason to have preferred Atos' opinion. Their preference cannot have been arbitrary and so they must be able to explain it, but they have not.
37. I am therefore unable to find that NHS BSA gave proper consideration to Mrs Wilczynski's application. I uphold her complaint on that basis.

38. The proper course of action is for me to remit the decision and I have made directions accordingly – in this case requiring NHS BSA initially to give Mrs Wilczynski their reason(s) for preferring Atos' opinion rather than reconsidering their decision (unless that is, they find their decision is not supportable).
39. This whole matter has inevitably caused Mrs Wilczynski distress and inconvenience, which I have recognised in my below directions.

Directions

40. Within 21 days of the date of my final determination, NHS BSA shall provide Mrs Wilczynski with a reasoned explanation for their decision to accept Atos' opinion over the opinions of Mr Birch, Professor Mulholland and her GP - or to review their decision if it cannot be supported by reasons. They will allow Mrs Wilczynski a further opportunity to appeal the decision if she so wishes.
41. Within 10 days of the date of my final determination, NHS BSA shall pay Mrs Wilczynski £250 for distress and inconvenience caused.

Jane Irvine
Deputy Pensions Ombudsman

15 August 2014