PO-5695

Ombudsman's Determination

Complaint Summary

Applicant	Mrs Emma Webb
Scheme	NHS Injury Benefit Scheme (**the Scheme**)
Respondent	NHS Business Services Authority (**NHSBSA**)

Complaint summary

Mrs Webb has complained that NHSBSA have refused to award her a Permanent Injury Benefit (**PIB**).

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against NHSBSA because they have not properly considered whether Mrs Webb's Fibromyalgia has caused her a Permanent Loss of Earnings Ability (**PLOEA**).

Detailed Determination

The National Health Service (Injury Benefits) Regulations 1995 (as amended)

1. As relevant Regulation 3 (Persons to whom the regulations apply) states:

> "(1)…these Regulations apply to any person who, while he-
> (a) is in the paid employment of an employing authority;
> …sustains an injury, or contracts a disease, 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…"

2. PIB is available where the above criteria are met and the person has consequently suffered a PLOEA (that is to age 65) of greater than10 per cent.

Material Facts

3. Mrs Webb was a full-time trainee microbiologist when in February 1996, she contracted Heamolytic Uraemic Syndrome (**HUS**), following exposure to E-Coli 0157 in the laboratory at Hemel Hemstead General Hospital. She returned to work in July 1996, on a phased basis, the intention being to return to full-time hours by October.

4. In August 1996, Mrs Webb went on annual leave and subsequently resigned without returning to work (effective 7 October 1996).

5. From November 1996 to December 2000, Mrs Webb worked full time for Bio Products Laboratory (also within the NHS). She changed to part-time from January 2001.

6. Mrs Webb left Bio Products Laboratory in December 2004. From October 2006, she was employed as a part-time School Science Technician.

7. In July 2008, Mrs Webb applied for PIB.

8. An Atos doctor gave his opinion to NHSBSA that Mrs Webb's illness had not caused her a PLOEA:

> "Letters from the treating Nephrologist indicate that she has recovered well and has normal renal function. She is being treated for hypertension.
>
> The applicant indicates that she is unable to work full-time because of symptoms of fatigue. The latest clinic letter dated 31 July 2008 ,indicates that she is anaemic secondary to iron/B12 deficiency. Extensive investigations have failed to identify a

case for her anaemia, however it is not considered to be related to her previous episode of Haemolytic Uraemic Syndrome in 1996. Hypertension is not a cause of fatigue.

It is assessed that there is a contributory causal connection (which need not be the sole, dominant, direct or proximate cause and effect), between the injury/condition(s) applied for and the NHS employment in this case;

…

It is advised that this applicant's Haemolytic Uraemic Syndrome meets the relevant attribution test in accordance with the Terms of Reference.

In relation to the assessment of Permanent Loss of Earnings Ability PLOEA:

The symptoms of fatigue that are interfering with her ability to work full time are considered to be unrelated to Haemolytic Uraemic Syndrome and therefore cannot be considered when assessing PLOEA due to the accepted condition. Although, a causal connection has been accepted according to the above Terms of Reference, the evidence indicates that she made a good recovery from the acute illness.

It is therefore advised that there is no PLOEA as a consequence of her exposure to E.Coli 0157 which resulted in the development of Haemolytic Uraemic Syndrome."

9. After due consideration NHSBSA accepted the medical adviser's opinion and turned down Mrs Webb's application (in April 2009).

10. In February 2013, Mrs Webb appealed (invoking stage one of the Scheme's two-stage internal dispute resolution (**IDR**) procedures), on the grounds that both her GP (Dr Dexter), and Consultant Rheumatologist (Dr Axon), were of the opinion that the episode of HUS had triggered her Fibromyalgia. This had given rise to chronic fatigue and pain and meant that she had been unable to work full-time (since 2000) and consequently she had suffered a PLOEA.

11. After considering the medical evidence another Atos doctor gave his opinion to NHSBSA that:

- Mrs Webb's: psychological health issues, hypertension, fatigue and fibromyalgia were attributable to her NHS employment (that is attributable to the E.Coli infection), bur her anaemia was not;
- there was no PLOEA resulting from the accepted conditions:

  "The applicant is 42 years old.

  She recently commenced a two year course of psychotherapy.

  Once she has completed this treatment it is more likely than not that she will benefit from graded exercise therapy, sleep hygiene, medications and other treatments for her current fibromyalgia and fatigue symptoms, including under specialist care.

  Her hypertension (treated) is not likely to impact on capacity for work

> It is considered more likely than not that she will recover from her attributable physical and mental health conditions sufficient to be able to successfully return to full time work as an MLSO [Medical Laboratory Scientific Officer] within the coming 23 years to age 65.
>
> There is no relevant permanent incapacity.
>
> Therefore there is no relevant permanent loss of earnings ability."

12. NHSBSA accepted Atos' opinion and turned down Mrs Webb's stage one appeal.

13. At IDR stage two Mrs Webb submitted current letters from Dr Warwicker (Consultant Nephrologist) and Dr Axon.

14. Dr Warwicker, in his letter of 1 January 2014, said:

> "Whilst I am delighted she has made a good renal recovery (kidney function) I consider that there have been a number of physical and psychological consequences arising from the original illness that appear to have had a profound effect on her life, and capacity to work. I would consider that this has caused a loss of earnings of at least 10% (and certainly in recent years considerably more)."

15. Dr Axon, in his letter of 9 January 2014, said:

> "Fibromyalgia does come in a variety of forms. There is no doubt that there is a form of fibromyalgia that can improve over two years. However, there is no doubt that Mrs Webb has had fibromyalgia for a considerable length of time. In rheumatology we generally have a rule that if there has been no further improvement after 5 years of fibromyalgia then the symptoms are likely to be stable with no further improvement. Therefore Mrs Webb has had a chronic form of fibromyalgia which has really been pretty stable without any improvement since she developed it following the infective episode in 1996.
>
> This leaves her with symptoms that prevent her from functioning with normal energy levels and certainly will never be able to contemplate full time employment again."

16. Atos requested a current report from Dr Ramsay (GP). In her report of 13 March 2014, Dr Ramsay, among other things said:

- Mrs Webb's struggles with ongoing tiredness and lack of energy was attributed to her HUS in 1996;
- she had been referred to a Consultant Ophthalmologist the previous February because of visual disturbance affecting the left eye and a Neurologist had said that this was suggestive of SUNCT syndrome - Dr Ramsay enclosed reports from three Specialists (Miss Cunningham – Consultant Ophthalmic Surgeon, Mr Bhalara – Consultant Rheumatologist and Dr Rakowicz – Consultant Neurologist);
- since then she had been having quite significant stresses from her part-time work as a Science Technician which she had subsequently given up;

17. Dr Ramsay concluded her report by saying:

> "I am unsure as to the prognosis of [Mrs Webb's] ongoing symptoms of tiredness and lack of energy. I think, on an ongoing basis, She would find it difficult to cope with full time work because of her ongoing problems. It is difficult to know where her new symptoms with her visual disturbance and headaches tie into her previous problems with the Haemolytic Uraemic Syndrome."

18. In a report to NHSBSA another Atos doctor agreed with the previous Atos doctor's opinion on the medical conditions that were attributable to Mrs Webb's NHS employment and then commenting on "any possible long term effects of the attributable conditions" said:

> "The GP, Dr Ramsay, states in her recent report that Mrs Webb continues to complain of tiredness, headaches and loss of confidence socially and that she has been found to have low Ferritin level leading to iron supplement treatment. She is said to be unable to work full time.
>
> Dr Ramsay states that Mrs Webb has been suffering from significant stress since having a condition causing visual disturbance in her left eye last year. A blood pressure monitor showed normal results. She gave up work as a part time Science Technician, however the GP goes on to say that Mrs Webb had hoped to get back to some form of work earlier this year. Her Ferritin remained low. She was prescribed antidepressant medication. Her husband's redundancy in December '12 had contributed to stress related symptoms. The GP adds that the Neurologist has suggested that headaches and visual disturbance may be due to a SUNCT Syndrome (Short Lasting Unilateral Neuralgiform Headache with Conjunctiva Injection and Tearing) on prognosis the GP expresses some uncertainty and offers the opinion that she would find it difficult to cope with full time work with her ongoing problems.
>
> The reports from the Rheumatologist, Ophthalmic Surgeon and Neurologist dating between May and October '13 give added detail on investigations and diagnoses for ongoing problems, and diagnoses are listed as SUNCT Syndrome, probable benign amaurosis, migraine without aura, and RTA Head Trauma in 1993. The Neurologist stated that Mrs Webb's confidence has been knocked by the effects of the above conditions. The Ophthalmic Surgeon agreed with the Rheumatologist in June '13, that continuing symptoms might represent an atypical migrainous situation subsequent to previous trauma (RTA and head injury in 1993). These 3 specialists do not make any causal connection between continuing symptoms and the Haemolytic Uraemic Syndrome in 1996.
>
> The Consultant Nephrologist, Dr Warwicker, has provided a report based on the medical records and a consultation of 30/12/13. He states he has monitored and treated Mrs Webb since the late 90's. He states that her renal function recovered well after the episode of Haemolytic Uraemic Syndrome in 1996, however he adds that she complained of profound tiredness and required antihypertensive treatment after this illness, with frequent headaches, low mood and loss of confidence. He states that such symptoms have been a regular feature throughout her years of follow up and have adversely affected work capacity and life in general. He concludes that that [sic] this has caused a loss of earnings of at least 10% and in recent years, considerably more. Dr Warwicker makes no reference to the above conditions diagnosed by the 3 Specialists.

> There is a report from the Consultant Rheumatologist, Dr Axon, of 9/1/14 who was involved in Mrs Webb's care from September'11. The history of Haemolytic Uraemic Syndrome in 1996 and Iron Deficiency Anaemia was noted. Fibromyalgia was diagnosed and the opinion offered this had been triggered by the infection in 1996 and that it would prevent her again returning to full time employment. It is noted that Dr Axon makes no reference to the findings of the 3 Specialists above. It is also noted that the Rheumatologist involved in Mrs Webb's care in May'13 made no reference to fibromyalgia."

19. The Atos adviser concluded:

> "With reference to problems accepted as previously meeting the attribution criteria – a mental health condition, hypertension, fatigue and fibromyalgia, it has been noted in specialist reports following thorough investigation of continuing symptoms, in 2013, that different diagnoses of conditions unrelated to the 1996 illness have been put forward. In fact a connection with an injury in 1993 has been suggested. Recent and continuing mental health symptoms have been related to conditions not considered attributable to illness in 1996. The hypertension is not considered to be a cause of incapacity for work. Iron deficiency Anaemia, which has not been accepted as attributable is likely to have been a significant cause for tiredness / fatigue. It is advised that there is not evidence from specialists involved in recent investigation and treatment, that continuing symptoms are attributable to the 1996 illness, therefore it is advised that there is no permanent loss in earning ability due to an attributable condition."

20. NHSBSA duly turned down Mrs Webb's final appeal on the grounds that she had not suffered a PLOEA as a result of the accepted conditions.

Summary of Mrs Webb's position

21. Mrs Webb says:

- HUS is a rare condition, especially in young adults;
- there are few if any similar cases on which to draw a comparison and thankfully due to enforced changes there will be no subsequent laboratory-acquired HUS;
- it was a life-threatening illness which has resulted in a career change and precluded her from ever working full-time again;
- NHSBSA's stage two decision is perverse because the Atos adviser barely mentioned the reports of Dr Warwicker (1 January 2014) and Dr Axon (9 January 2014), and instead concentrated on totally unrelated symptoms and reports from three consultants (Dr Rakowicz – Consultant Neurologist, Miss Cunningham – Consultant Ophthalmic Surgeon and Mr Bhalara – Consultant Rheumatologist) that she had seen in 2013;
- this clouded the facts pertaining to her case, namely that her Fibromyalgia was triggered by the E Coli infection and caused her a PLOEA;

- both Dr Warwicker and Dr Axon are experts in their respective field, namely HUS and Fibromyalgia, and state without ambiguity that she can never contemplate full-time employment again;
- Dr Warwicker has treated her for over 15 years and in his opinion has seen a deterioration in her condition in that time;
- Dr Axon also states that her symptoms of Fibromyalgia are permanent, which goes against Atos' opinion that it will respond to treatment;
- while she understands that Atos are experts in occupational health. one has to question how many cases of HUS-triggered Fibromyalgia they have seen;
- she was not given the opportunity to comment on the 2013 reports despite signing a consent form for her medical records to be released after she had had a chance to review them.

Summary of NHSBSA's position

NHSBSA say:

- they have properly considered Mrs Webb's application, taking into account and weighing all of the relevant evidence and nothing irrelevant;
- they accept that Mrs Webb contracted HUS in 1996 in the course of her NHS employment and therefore this condition and the subsequent medical conditions; psychological, hypertension, fatigue and fibromyalgia are attributable to her NHS employment;
- but do not consider that she has suffered a PLOEA as a result of the accepted conditions;
- they consider that her ongoing conditions are not the result of the injury in 1996.

Conclusions

22. My role in this matter is not to decide whether Mrs Webb is entitled to PIB - that is for NHSBSA to decide following consultation with Atos. Also, it is not for me to agree or disagree with any medical opinion.

23. My role is to decide whether NHSBSA have correctly applied the Scheme's Regulations, asked right questions, considered all relevant information and made a proper 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.

24. Regulation 3(2) of the Scheme Regulations applies where an injury sustained or a disease contracted in the course of NHS employment is wholly or mainly attributable to the NHS employment or the duties of the NHS employment and, if those criteria are met, leads to a PLOEA of more than 10 per cent. Answering either question is a finding of fact for NHSBSA (or their Medical Advisers under a delegated power – original decision only).

25. I am satisfied that NHSBSA have applied the Scheme's Regulations correctly.

26. Atos at IDR stage 2 accept that Mrs Webb's fibromyalgia is attributable to the duties of her NHS employment, but refer to their opinion at IDR stage 1 that more likely than not Mrs Webb would benefit from a range of treatments for fibromyalgia and fatigue.

27. Atos appear to have dismissed Dr Axon's later report (which Mrs Webb had obtained to counter the opinion of Atos at IDR stage 1) on the grounds that Dr Axon had not referred to the findings of the three Specialist reports, including one from Mr Bhalara (Consultant Rheumatologist) who does not mention Mrs Webb's fibromyalgia.

28. Atos appear to have been side tracked by the Specialist reports, none of which comment on the condition that Mrs Webb's PIB claim is for – fibromyalgia. The reports of the three Specialists concern Mrs Webb's new symptoms (sharp stabbing pain in the region of the left temple with tearing). Consequently, there is no reason why they would have referred to Mrs Webb's fibromyalgia. Equally, there is no reason why Dr Axon would have mentioned the Specialists reports in his letter as he was commenting solely on the condition that is the subject of Mrs Webb's claim.

29. Mr Bhalara's report to the Consultant Ophthalmic Surgeon gave his opinion on Mrs Webb's new symptoms – he was asked to comment on her recent symptoms, rather than the existing diagnosis of fibromyalgia for which Mrs Webb was seeing Dr Axon. Atos did not ask Mr Bhalara for his opinion on whether Mrs Webb's fibromyalgia was likely to mean a PLOEA.

30. Atos say at IDR stage 2 that Mrs Webb's anaemia is likely to be a significant cause for her fatigue and tiredness, but do not say why they disagree with Dr Axon's opinion (that Mrs Webb's fibromyalgia is likely to be stable with no further improvement and prevents her "functioning with normal energy levels and certainly will never be able to contemplate full employment again").

31. None of this seems to have been picked up by NHSBSA, which suggests NHSBSA merely rubber stamped Atos' opinion, rather than actively reviewed the advice they had received.

32. As, I consider that NHSBSA's decision has not been properly made I remit the matter back to NHSBSA to consider afresh.

Directions

33. Within 21 days of the date of the final determination, NHSBSA shall seek further appropriate medical advice to address the matters identified above and will then reconsider (within a further 14 days of obtaining said advice) Mrs Webb's eligibility for a PIB.

34. They will allow Mrs Webb a further opportunity to appeal the decision if she so wishes.

Anthony Arter

Pensions Ombudsman
13 July 2015