

Ombudsman's Determination

Applicant	Dr A
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Dr A'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. Dr A's complaint is that NHS BSA incorrectly calculated her NHS Permanent Injury Benefit (**PIB**).

Background information, including submissions from the parties

4. The Scheme provides PIB for members who suffer a permanent loss of earning ability (**PLOEA**) in excess of 10% as a result of an injury sustained or disease contracted which is wholly or mainly attributable to their NHS employment. 'Permanent' in this context means to normal retirement age 65.
5. Dr A, a General Practitioner (**GP**), was diagnosed with Hepatitis C in March 2008 which was contracted as a direct result of her NHS employment. She commenced lower paid employment, including a reduction to hours, on 1 October 2008. Dr A became entitled to PIB from the date she had to reduce her hours.
6. In September 2013, NHS BSA assessed her PIB and awarded her with Band 3 (33% reduction of pay).
7. In October 2013, Dr A sent a letter to NHS BSA disputing, what she believed to be discrepancies in figures.
8. In November 2013, Dr A requested a deterioration review as her health turned for the worse.

9. In December 2013, NHS BSA sent a letter to Dr A acknowledging her request but saying that it wouldn't process the request for a deterioration review until it answered her raised query.
10. On 10 February 2014, NHS BSA sent a letter to Dr A explaining that it used the wrong figures in calculating her PLOEA and that her file had been returned to the Scheme's medical advisors to reconsider her PLOEA and deterioration review.
11. On 24 June 2014, NHS BSA sent a letter to Dr A informing her that the outcome of the review was Band 4 (55% reduction of pay).
12. On 1 January 2015, Dr A sent a letter to NHS BSA informing it that she had stopped working.
13. On 21 January 2015, Dr A invoked the two-stage internal dispute resolution procedure (**IDRP**).
14. On 25 March 2015, NHS BSA sent a response to Dr A, under stage one of the IDRP, that said:

“...I am satisfied we have been fair in the calculations of your average remuneration and PLOEA, based upon the figures provided to NHS Pensions, I therefore do not uphold your dispute.”
15. On 20 July 2015, NHS BSA sent a response to Dr A, under stage two of the IDRP. It upheld her complaint in part with regard to calculating the emolument as at 30 September 2008, in determining PLOEA and the incorrect pay figure used for PLOEA purposes. NHS BSA also apologised for the error.
16. In December 2015, Dr A brought the complaint to this Office.
17. On 11 May 2016, NHS BSA sent this Office a formal response. It maintained its position as provided stated at stage two of the IDRP.

Dr A's position:

18. She questions the figure of £48,450 that NHS BSA used in PLOEA decision.
19. She presumes that NHS BSA has access to her annual certificates therefore she should not be responsible for providing these to NHS BSA.
20. She says that NHS BSA incorrectly interpreted the definition of 'emoluments' which, in her own understanding, should include locum payments.
21. NHS BSA is incorrect in saying that 'pensionable pay' should be used in determining the average remuneration, used for Officer, instead of 'pensionable earnings' used in respect of practitioners.
22. Her Officer's pay should be included in her Practitioner's pay in determining the average remuneration pay.

23. She maintains that her abatement level should be represented by the emolument figure rather than average remuneration figure.
24. Her PIB should be based on the actual income received in the relevant period rather than simple apportionment of annual income.

NHS BSA's position:

25. The figure of £48,450 is the figure that NHS BSA concluded that Dr A would be capable of earning in the assessment of PLOEA.
26. NHS BSA does not have access to Dr A's annual certificates as it is the GP's responsibility to provide them to NHS BSA through the website for GPs.
27. The definition of emoluments provided within Regulation 2 does not include locum payments.
28. GP's pensionable pay for a GP Provider, is their share of the surgery profit less expenses, because of this a self-employed GP Provider's income fluctuates throughout the year unlike salaried doctors' income.
29. The calculation of average remuneration pay is based solely on Practitioner's pensionable income including Bed Fund income. This is because Dr A claimed her PIB as a Practitioner and not as an Officer.
30. Regulation 13 states that if the emoluments that Dr A earns in her further employment, plus the pension payable to her exceed the average remuneration figure then the allowance will be abated.

Adjudicator's Opinion

31. Dr A'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:-
 - NHS BSA has agreed that it made an error in calculating the average remuneration figure as at 30 September 2008. The Adjudicator was satisfied that NHS BSA had rectified this and apologised for the error.
 - The Adjudicator reviewed the Scheme Regulations and concluded that NHS BSA had correctly applied them. NHS BSA relies on Regulations 4(4), 13(4), and 2 of the NHS Injury Benefit Regulations 1995 (**the PIB Regulations**), see Appendix. Essentially, Dr A applied for PIB as a Practitioner and not an Officer so the Adjudicator recognised that the Regulations for Practitioners must apply.
 - There are no provisions under the PIB Regulations to regard Officer's pay as Practitioner's pay for the purpose of calculating the average remuneration. So, the Adjudicator disagreed with Dr A when she said that her Officer's pay should be included in the calculation of her average remuneration.

- NHS BSA said that the legal definition of ‘emoluments’ does not make specific reference to Practitioners. So, it can legitimately base the average emoluments on either the apportioned pension year (i.e. April to March) or the apportioned practice accounts year (i.e. July to June).
 - In its calculation, NHS BSA apportioned Dr A’s income to take account that her reduction in pay occurred mid-year and not at the pension year-end. NHS BSA confirmed that it used the most favourable average emolument figure in its calculations. The Adjudicator believed this to be a reasonable approach.
 - Dr A says that her emoluments should include her locum payments that she incurred whilst being on sick leave. However, the Adjudicator has considered the definition of emoluments under Regulation 2 which states that “it does not include payments for overtime..., or to cover expenses incurred, by him for the purpose of his employment”. So, the Adjudicator disagreed with Dr A on this point.
 - Regulation 13(4) makes a provision for the PIB to be subject to abatement when a person continues to be employed within NHS and confirms that if their pay exceeds the amount of their former earnings (where former earnings relate to the average remuneration), then the allowance would be abated.
 - The Adjudicator considered that, based on the available evidence, NHS BSA had acted correctly in accordance with the Scheme Regulations in the calculation of Dr A’s PIB. The Adjudicator did not find any evidence that would show that NHS BSA acted with maladministration, and did not uphold the complaint.
32. Dr A did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Dr A 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 Dr A for completeness.
33. Dr A maintains her assertion that NHS BSA’s interpretation of the definition of ‘average remuneration’ within Regulation 2(1) is incorrect. She believes that the definition applies to both Officer and Practitioner.
34. Dr A also says that there is a provision within the Scheme Regulations with regard to Officer’s pay as Practitioner’s pay when calculating average remuneration taking into account the fact that she had retired on 30 September 2008. So that the average remuneration must be calculated as if she had retired on the date her earnings reduced.
35. Dr A says that NHS BSA omitted some of her GP earnings when calculating her average remuneration of £74,324.53 as at 30 September 2008. This is because NHS BSA excluded six months’ worth of earnings (1 January 2008 until 30 September 2008) in the calculation of her average remuneration.

Ombudsman's decision

36. Dr A asserts that NHS BSA's interpretation of the definition of 'average remuneration' is incorrect. I have considered Regulation 2(1) and have not found NHS BSA's interpretation to be incorrect. This Regulation relates to Practitioners applying for PIB so it should only include Practitioner's pay. There are no provisions under the PIB Regulations to regard Officer's pensionable pay as a Practitioner's pay.
37. Dr A contends that her average remuneration must be calculated as if she had retired on the date her earnings reduced. I believe that Dr A refers to different Regulations with regard to her Pension Benefit calculation that takes into account her retirement date. As Dr A's complaint refers to the calculation of her PIB, Regulation 2(1) must apply.
38. When calculating Dr A's average remuneration for the PIB calculation, NHS BSA must take into account her pensionable earnings up to 30 September 2008 and not her actual income. Dr A moved into a lower paid role on 1 October 2008, the date on which her PIB was payable. However, as has been explained by the Adjudicator, a GP surgery's accounts year is not the same as the NHS accounts year. So Dr A's surgery income from 1 July 2008 to 30 June 2009 would have been included in the 2009/2010 apportioned pensionable pay and not the 2008/2009 one.
39. I have not found any errors or omissions by NHS BSA in applying the regulations to Dr A's case.
40. Therefore, I do not uphold Dr A's complaint.

Anthony Arter

Pensions Ombudsman
1 December 2017

Appendix

The National Health Service (Injury Benefits) Regulations 1995

Regulation 4(4) states:

(4) Where a person to whom regulation 3(1) applies suffers a reduction in the emoluments of an employment mentioned in that regulation by reason of the injury or disease, there shall be payable, from the date of that reduction, an annual allowance-

(a) of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6), will provide an income of the percentage of his average remuneration shown in whichever column of the table in paragraph (2) is appropriate to his service in relation to the degree by which his earning ability is reduced at the date that his emoluments were reduced;...

Provided that regulation 13(4) shall apply to that allowance as if the person had ceased to be employed on the day before his emoluments were reduced and had been re-employed on the following day with the reduced emoluments.-...

Regulation 13(4) states:

(4) Where a person who is entitled to an allowance under Part II again becomes employed in an employment mentioned in regulation 3(1) or becomes employed in an employment mentioned in any corresponding provision in force in Scotland, Northern Ireland or the Isle of man, then, whilst he continues in such employment, the allowance under Part II shall be abated by any amount by which it would, when aggregated with his relevant income, exceed the amount of his former earnings.

For the purposes of this paragraph-

(a) "relevant income" means the amount of any emoluments payable to the person in question in respect of the further employment plus the amount of any pension payable to him under a relevant pension scheme;

(b) "former earnings" means, in relation to that person, the average remuneration by reference to which the allowance was determined or the annual rate of his emoluments at the date on which the allowance became payable, whichever is higher;

(c) Where the further employment is employment of the type mentioned in regulation 3(1)(c), that person shall be deemed to be in receipt of emoluments equal in amount to those which would have been payable, in the opinion of the Secretary of State, to a person employed whole-time by an employing authority on similar duties".

Regulation 2 provides the interpretation of 'emoluments':

"emoluments" means all salary, wages, fees and other payments paid or made to a person as such for his own use, and also the money value of any accommodation or other allowances in kind appertaining to his employment, but does not include payments for

overtime which are not a usual incident of his employment, or any allowances payable to him to cover the cost of providing office accommodation or clerical or other assistance, or any travelling or subsistence allowance or other money to be spent, or to cover expenses incurred, by him for the purposes of his employment; and where fees or other variable payments were made to a person as part of his emoluments during any period immediately preceding a reduction of emoluments, the amount in respect of fees or other variable payments were made to a person as part of his emoluments during any period immediately preceding a reduction of emoluments, the amount in respect of fees or other variable payments to be included in the emoluments shall be the average of the fees or other payments paid to him during the period of 3 years immediately preceding the reduction of the emoluments, or such other period as the Secretary of State may think reasonable in the circumstances”.

Regulation 2(1) provides the interpretation of ‘average remuneration’. The following is an extract:

“average remuneration” means-

(a) In relation to a practitioner, the yearly average of such amount as would be or would have been his up-rated earnings within the meaning of whichever of the following is applicable-

(i) paragraph 11(2) of Schedule 2 to the 2008 Regulations, as a practitioner to whom those Regulations apply;

(ii) regulation 3.D.1(4)(b) of the 2008 Regulations, as a practitioner to whom those Regulations apply;

as the case may be, calculated as if he had retired-

(d) in the case of a person eligible for an allowance under regulation 4(4) or (5), on the date on which his emoluments were reduced;

Regulation 4(9) provides the payment of a lump sum once employment ceases due to the injury or disease:

“(9) A person mentioned in paragraph (2) or (3), or a person mentioned in paragraph (4) who subsequently ceases to be employed as such a person by reason of the injury or disease, shall be entitled to receive a lump sum of the proportion of average remuneration shown in column (2) of the table hereunder in relation to the degree by which his earning is reduced”.