

Ombudsman's Determination

Applicant	Mrs S
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent	NHS Business Service Authority (NHS BSA)

Outcome

1. Mrs S' complaint is upheld and to put matters right NHS Pensions should write off the overpayment in question and reimburse Mrs S any overpayments it has already recovered, with interest added.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. NHS BSA has paid Mrs S a higher income than the benefits she is entitled to under the Scheme (**NHS benefits**). Mrs S is unhappy because she has been overpaid a total of £31,529.80 between October 2002 and March 2012. NHS BSA initially agreed to write-off £16,142.95, for the period between October 2002 and December 2007. However, it still wished to recover the remaining balance of £15,386.85.
4. Mrs S feels this is unfair because she relied on the additional income in good faith and now she cannot afford to repay it.

Background information, including submissions from the parties

5. Firstly, it is important to highlight that the overpayment in question was not the first overpayment Mrs S has received from NHS BSA. Between 1996 and 2002, NHS BSA overpaid Mrs S £21,483.89. However, a repayment plan for this amount was agreed in 2004 and Mrs S has accepted that the time limit for her to raise a complaint about this overpayment with our Office has now passed. However, the reason for the first overpayment is linked to the second overpayment.
6. In 2003, NHS BSA discovered that Mrs S had been receiving Incapacity Benefit from the Department of Work and Pensions (**state benefits**) since 1996. Her NHS benefits ought to have been lower to reflect this, and hence she had been overpaid. This was the first overpayment and was not investigated by this Office.

7. In October 2003, Mrs S's state benefits were temporarily stopped. Whilst she appealed this, she requested that her full NHS benefits be reinstated.
8. In March 2004, NHS BSA said it would wait until the outcome of her appeal involving her state benefits, before recalculating her NHS benefits. However, by August 2004 there was still no conclusion regarding Mrs S' state benefits. NHS BSA therefore agreed to increase her NHS benefits.
9. In 2005, Mrs S' state benefits were reinstated and backdated. Mrs S says she rang NHS BSA to inform it of this, but she was told it would not affect her NHS benefits.
10. On 28 February 2006, Mrs S wrote a letter in which she referred to two recent telephone conversations regarding her NHS benefits. In particular, Mrs S wrote:

"I am writing as I still haven't heard from your office regarding my informing you over the phone about my receipt of [state benefits] in Dec 2005. I spoke to [named representative] who told me the above had nothing to do with your office on the 9th/12/05 [sic] 1.49pm and that it will make no difference to my pension.

Not being satisfied, I spoke to another lady in your office to have the previous message for [named representative] put in writing to me on the 11/01/06. She in turn told me the same and said she will pass the message on and that your office will call or write to confirm. None of the above is [sic] happened to date.

I am writing to you so you can confirm or sort matters up [sic] as I am not responsible for any overpayment and cannot afford to pay any monies back again."

11. The evidence indicates this letter was faxed to, and received by, Paymaster Limited (**Equiniti**). In particular, on 8 March 2006, Equiniti wrote to Mrs S stating:

"Thank you for your recent enquiry.

I can confirm that the payment of NHS Injury Allowance will not be affected by payment of the [state benefits]."

12. On 7 March 2017, NHS BSA confirmed with our Office that Equiniti is its paying agent. Furthermore, it confirmed that it is liable for Equiniti's actions and errors.
13. In 2007, NHS BSA carried out a review, after it came to light that it had been interpreting a piece of legislation incorrectly. It wrote to all Scheme members and explained why the review was taking place. On 24 November 2007, it wrote to Mrs S specifically and stated that she had been underpaid by £7,713.28. The letter also stated "The amount of [NHS benefits] you receive will not change as a result of this review".

14. NHS BSA has confirmed that the review was carried out based solely on information held on file. At this point, Mrs S' file did not record that she was receiving state benefits.
15. In 2013, NHS BSA reviewed Mrs S' benefits and on this occasion discovered that she had been receiving state benefits. NHS BSA told Mrs S that her NHS benefits ought to have been reduced when she began to receive state benefits again. As her state benefits had been backdated, and therefore had effectively been continuous, NHS BSA confirmed it had been overpaying her since 2002.
16. NHS BSA offered to write off approximately half of the outstanding balance, which covered the period from 2002 up to the review in 2007. NHS BSA has said this is because Mrs S ought to have realised in 2007, as part of the review, that her NHS benefits were incorrect. In particular, NHS BSA believes the letter sent to Mrs S at this time should have prompted her to check whether her state benefits affected her NHS benefits.
17. Mrs S says that, following her telephone conversations in 2005 and the letter she received in March 2006, she has spent the additional income in good faith. She has also provided evidence to show she has relied on what she was told by NHS BSA to her detriment.
18. In particular, Mrs S has provided a hire purchase agreement (**the HP agreement**) for a car, which she signed on 11 January 2006. The HP agreement had a term of approximately five years and the total amount payable was over £20,000.
19. Mrs S has also provided a selection of historic bank statements: f2006; 2007; 2010; and 2012. These evidence that, during the period of the overpayment, she spent any income she received.
20. NHS BSA has argued that, even if Mrs S had not been misled about her NHS benefits, it is likely she would still have purchased a car. Therefore, it does not feel it is reasonable for Mrs S to say she relied entirely on NHS BSA's statements when obtaining finance to purchase a car.
21. NHS BSA also highlighted that Mrs S did not raise the defences of change of position or estoppel when she complained to it directly. It therefore has not had the opportunity to consider whether these legal defences have been satisfied.

Adjudicator's Opinion

22. Mrs S' complaint was considered by one of our Adjudicators who concluded that further action was required by NHS BSA. The Adjudicator's findings are summarised briefly below:-
 - The Adjudicator was satisfied that NHS BSA had had sufficient opportunity to consider whether the defences of estoppel and change of position applied in

Mrs S' case. In particular, the Adjudicator cited *Grievson v Grievson and Others* [2011] EWHC 1367 Ch, and stated that even though Mrs S may not have raised specific legal defences previously, this did not prevent the Adjudicator from considering them. The Adjudicator also noted that NHS BSA could have asked Mrs S appropriate questions, to see whether the defences applied rather than waiting for Mrs S to understand that she had this defence, when it was investigating Mrs S' complaint internally. However, instead, it appeared NHS BSA did not because it had already decided to recoup the overpayment in full.

- The Adjudicator felt that NHS BSA's offer to write off part of the overpayment did not make sense. However, in any event, the Adjudicator highlighted that the Limitation Act 1980 (**the Act**), and the recent ruling in the High Court case of *Webber v Department for Education and another* [2016] EWHC 2519 (Ch) (**the Webber judgment**), were applicable. In particular, the Adjudicator said that NHS BSA did not have the right to seek recoupment of overpayments made before 19 October 2009.
- For the remaining overpayments, the Adjudicator was satisfied that Mrs S could successfully raise the defence of estoppel or change of position. The Adjudicator felt that the evidence, on balance, indicated Mrs S had been told that her reinstated state benefits would not affect her NHS benefits. The Adjudicator was satisfied that Mrs S relied on this information when taking out her HP agreement and the chain of events supported this.
- From reviewing Mrs S' historic bank statements, the Adjudicator was also satisfied that Mrs S had spent what income she had throughout the overpayment period, and the Adjudicator was persuaded that some of Mrs S' expenditure could have been avoided and was spent instead on improving her daily quality of life.
- The Adjudicator noted that it was possible Mrs S may have always intended to purchase a car. However, the Adjudicator also considered that Mrs S may have found alternative ways of travelling which were cheaper or free – such as using family or colleagues to help her commute and so on if she had not had the benefit of the additional monies. The Adjudicator appreciated NHS BSA's arguments but felt the passage of time meant it would be unrealistic to establish now what alternative options Mrs S may have had then.
- Overall, the Adjudicator felt it was unreasonable to estimate a financial loss other than the full cost of the HP agreement. The car is now over ten years old and the HP agreement term has come to an end. The Adjudicator therefore also felt it was unreasonable to suggest Mrs S could do anything to mitigate her loss. The Adjudicator believed that Mrs S had spent the overpayments in such a way that her financial position was irreversible, and as such it would be unequitable for NHS BSA to recover any of the overpayment.

- Lastly, in further support of her position, the Adjudicator felt it was relevant Mrs S was already repaying one overpayment when she made her enquiries in 2005 and 2006. Based on this, it seemed likely that she would have not have spent any further overpayments unless she was completely satisfied she would not also have had to ultimately repay them.
23. NHS BSA accepted the Adjudicator's findings in relation to the Act and the Webber judgement. However, NHS BSA did not accept the Adjudicator's other findings, and as such the complaint has been passed to me to consider.
24. NHS BSA provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by NHS BSA for completeness.

Ombudsman's decision

25. NHS BSA has accepted the Adjudicator's analysis in relation to the Act and the Webber judgment. As such, I do not need to consider those findings, I need only to consider the overpayments made from 19 October 2009 to 12 March 2012.
26. For a successful defence of change of position, Mrs S needs to show that she has so changed her position in good faith such that it would be inequitable for NHS BSA to require her to repay money paid to her in error.
27. For a successful defence of estoppel by representation, Mrs S needs to show there has been an unambiguous representation on which she has reasonably relied in good faith to her detriment. Unlike change of position, this is an "all or nothing" defence.
28. I am satisfied that both defences are satisfied, for broadly the same reasons as the Adjudicator. I am persuaded that Mrs S received assurance from NHS BSA that she could rely on the income she was receiving from it going forward, and, I believe that she took out a HP agreement with this in mind. I am also satisfied that her historic bank statements indicate that, throughout the overpayment period, she simply spent the income she received on daily living expenses. I agree with the Adjudicator, that it is likely she would not have incurred the same expenditure, had she not received the overpayments.
29. I also find it persuasive that Mrs S was already repaying a previous and substantial overpayment, when she made her enquiries in 2005 and 2006. Mrs S would have been even less likely than most to rely on what she was told about her NHS benefits, unless she was completely reassured that she could. This is because she knew full well the implications of receiving overpayments, and she had already agreed to one repayment plan.

30. As such, I believe Mrs S has relied on the overpayments in good faith and that she irreversibly changed her financial position as a result. I find that it would be inequitable for NHS BSA to recover the overpayments in question.
31. Therefore, I uphold Mrs S' complaint.

Directions

32. NHS BSA are not to attempt to recover any further monies from Mrs S.
33. Within 28 days of the date of this Determination, NHS BSA will repay Mrs S any overpayment it has already recovered in respect of the overpayment made between October 2002 and March 2012, together with interest.
34. Interest shall be paid at the base rate for the time being quoted by the reference banks, calculated from the dates Mrs N made repayments up to the date NHS BSA refunds the payments to her.
35. I do not, however, believe it would be reasonable to ask NHS BSA to pay Mrs S an award in addition to the overpayment. Whilst I acknowledge that this matter has caused Mrs S a great deal of stress, I also have to consider that she has had the benefit of a substantial sum of money to which, under the rules of Scheme, she was not entitled. As I have decided that she does not have to repay this, I believe it is sufficient compensation in the circumstances.

Anthony Arter

Pensions Ombudsman
9 June 2017