

Ombudsman's Determination

Applicant	Mr P
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

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

Complaint summary

2. Mr P's complaint concerns NHS BSA's decision not to award him a permanent injury benefit (**PIB**) on the basis that he has not sustained an injury, or contracted a disease, in the course of his NHS employment which is wholly or mainly attributable to that employment.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Mr P was employed by the Dudley Group NHS Foundation Trust (**the Trust**), as a catering assistant between 13 May 1996 and 31 May 2001. Thereafter his employment was transferred under the Transfer of Undertaking Protection of Employment Rights (**TUPE**) to Interserve.
5. On 6 May 2016, Mr P applied for a PIB completing form AW13.
6. The relevant regulations are the NHS Injury Benefit Regulations 1995 (as amended) (**The Regulations**). The Regulations apply to a person who sustains an injury, or contracts a disease, before 31 March 2013. Briefly, in order to be considered for a PIB, the injury sustained, or disease contracted, must be deemed wholly or mainly attributable to the person's NHS employment or to the duties of that employment (Regulation 3). If the injury or disease is deemed to be wholly or mainly attributable to the NHS employment, the second eligibility criterion is that the person has suffered a permanent loss of earning ability (**PLOEA**) of more than 10% by reason of the injury or disease (Regulation 4).
7. Relevant sections from the Regulations are set out in the Appendix.

8. First instance decisions are provided by the Scheme's medical advisers (**SMA**) under delegated authority.
9. On 16 January 2017, the SMA wrote to Mr P and said that his application for PIB was declined. The SMA quoted the opinion of one of its doctors who had reviewed Mr P's case (**the First MA**):-
 - It was noted that Mr P was claiming for injuries sustained to his left arm, neck and shoulder, right arm, and lower back pain. He was also claiming for a heart condition sustained in 1998, blood disorders caused by treatment, epicondylitis, nerve damage and permanent back damage (**the Index Incidents**). Mr P believed that his medical records had been "fabricated" and "altered" to hinder his claim for a PIB.
 - In section 9 of form AW13, Mr P indicated that he fell over backwards and hit his left arm (elbow) after his manager left bottles on the floor and claimed for an electric shock when he opened a fridge door. No specific dates were entered, but Mr P indicated the injury sustained in 2000/01 had become increasingly disabling and he could no longer work.
 - There were no accident records or incident reports or Occupational Health records.
 - The GP records noted that:-
 - Between 4 May 2000 and 9 May 2001, Mr P attended six different appointments with his GP. In 2000 he was signed off due to a seizure and on 8 August 2000 he complained of lower back pain with left sided sciatica, however there was no mention of a work-related injury as the cause. In 2001, due to a chest infection he was prescribed antibiotics.
 - During 2001, results of a blood test presented abnormalities, though the GP believed this was possibly down to the medication he took to manage his seizures. Additional blood tests indicated that the abnormal results were likely inaccurate due to a delay in their handling.
 - There was nothing to indicate that Mr P attended any appointments relating to upper limb, neck, or shoulder problems during his NHS employment. On 24 August 2001, he attended an appointment for "tennis elbow left arm", though with no indication that this was the result of an injury. A week later he was referred for an orthopaedic assessment. A letter dated 5 September 2001 said that his elbow problem was causing him difficulties especially when playing guitar.
 - A report dated 9 September 2002, by a Dr Hagroo, said that Mr P did not recall any injuries to his elbow or wrist. Nerve conduction test results were normal, though a Dr Bullock referred Mr P to neurology after Mr P described tingling and numbness in his left elbow and wrist with further symptoms in his left hand. Again, there was nothing to suggest that Mr P sustained an injury whilst working.

- A report by Dr Tambimuttu, dated 8 September 2003, said: “[Mr P] told me that his problems began in September 2001 when he sustained a fall whilst at work”. Mr P’s GP records went on to say that he had an additional workplace accident in 2004. He had persistent problems with left sided upper limb pain from an unknown physical origin.
 - In 2012, Mr P was told that he did not have any heart related conditions. Based on the evidence available, it was likely that any pain he believed to be related to his heart, was actually the result of chronic pain in his upper left limb area.
 - In conclusion, Mr P’s arm and back pain were not wholly or mainly attributable to the duties of his NHS employment. So, there was no PLOEA to consider. There was nothing to suggest that Mr P had sustained an injury while working for the NHS. This was supported, in part, by the absence of any accident/incident reports. Nor was he referred to occupational health during his employment.
20. Mr P did not accept the First MA’s opinion and asked for his PIB application to be considered, on appeal, under stage one of the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). Mr P submitted that he was in receipt of benefits from the Department for Work and Pensions (**the DWP**) and also received Industrial Injuries Disablement Benefit (**IIDB**).
 21. On 13 March 2017, NHS BSA provided its stage one IDR P response and explained that the case had been reviewed by another doctor for the SMA (**the Second MA**). The Second MA agreed with the First MA’s opinion that based on the medical evidence Mr P’s chronic arm and back pain, claimed heart damage and blood disorders were not wholly or mainly attributable to the duties of his NHS employment.
 22. Having reviewed the Second MA’s opinion, NHS BSA did not agree that Mr P met the criteria for a PIB award. Based on the Second MA’s opinion, the reasoning behind NHS BSA’s decision to decline Mr P’s PIB application is summarised in paragraphs 23 to 34 below.
 23. The criteria for a PIB award differ from those for the payment of State benefits or IIDB by the DWP.
 24. NHS BSA was only able to consider incidents he was claiming for up until 31 May 2001, Mr P’s last day of NHS employment. It was unable to consider the workplace accident that Mr P said occurred in 2004, when he was employed by Interserve.
 25. The Trust’s records highlighted that, between 9 January 2000 and 10 March 2001, Mr P had four periods of absence varying from five days up to 96 days. There were no underlying reasons recorded for any of the absences. Further, there were no accident or incident reports associated with any of Mr P’s absences.
 26. The GP medical records said that, in 1991, Mr P complained of pain in his left forearm and hand with aching in his fourth and fifth fingers. He was diagnosed with golfer’s elbow. On 22 May 1998, he was prescribed anti-inflammatory tablets due to tenderness in his left arm and hand.

27. Between 8 August 2000 and 19 September 2000, Mr P was reviewed by his GP six times in relation to pain in his left leg and lower back suggesting possible sciatica. On 16 October 2000, he complained of left knee pain and was referred for physiotherapy. In the early months of 2001, he saw his GP on several occasions with respiratory complaints and he was investigated for an abnormal blood test. Further hospital tests were normal. During this time, there were no records of a work-related injury.
28. Mr P was seen by Mr Butt (Consultant Orthopaedic Surgeon) on 2 May 2002 due to ongoing discomfort in his hand, wrist and elbow which was interfering with his hobby as a guitar player which he did part-time. Mr Butt said that Mr P described his symptoms as getting worse following the accident at work "a few months ago". A report by a Dr Tambimuttu, dated 8 September 2003, referred to Mr P's upper limb problems beginning in September 2001 when he sustained a fall at work.
29. The GP records showed that Mr P continued to experience predominantly left sided limb pain, the cause of which was uncertain. He was eventually described as having a complex pain problem. In May 2006, a Pain Clinic noted that Mr P reported developing pain in his lower back, knees and general aches and pains.
30. A letter from a solicitor dated 12 April 2006 referenced a workplace injury claim for an incident in 2004, and cited a previous injury to his left elbow in 2001. However, it was unclear on what basis the assumption of an injury in 2001 was made other than Mr P's account of events.
31. It was accepted that, Mr P had experienced upper limb pain and discomfort for many years. However, there was no medical evidence to support his claim that this was due to an accident in work in 2000/2001. During the period 2000 up to 31 May 2001, Mr P did not consult his GP for any upper limb, neck or arm symptoms. Although during this period he consulted his GP regularly for other unrelated problems there was no mention of an injury. There was, however, medical evidence to indicate that he had suffered left upper limb symptoms prior to 2000.
32. Mr P's claim was based purely on his record of events which showed inconsistencies. Therefore, it was not accepted that his left upper limb, neck and shoulder symptoms were attributable to his NHS employment.
33. There was no evidence to support Mr P's claims that he suffered heart damage in 1998. A report by Dr Banks (Consultant Cardiologist), dated 20 June 2012, explained that his ECHO and MRI scans were normal and "he has nothing seriously wrong with his heart, any previous cardiac diagnoses...should be expunged from his medical record".
34. In September 2003, Mr P told Dr Tambimuttu that he had issues at work following a fall in September 2001. This was after he left NHS employment and was in non-NHS employment with Interserve. So, the incident could not be considered as part of his claim for a PIB.
35. On 23 March 2017, Mr P asked for his appeal to be investigated under stage two of the Scheme's IDRP. He did not provide any additional information or medical evidence.

36. On 5 June 2017, NHS BSA responded to Mr P's stage two IDRPs appeal and said that it had been considered by a new MA (**the Third MA**). Broadly, the Third MA's opinion reiterated the same points raised by the First and Second MAs and added that:-
- Hospital correspondence from between 13 May 1996 and 31 May 2001 showed that Mr P was in the care of various specialists investigating dizzy spells/blackouts which were thought to be associated with epilepsy. However, after a second opinion/tests, in 2002, his results were normal, and he was discharged from any additional investigations.
 - A Dr Poole wrote to Interserve, on 19 April 2002, and explained that nerve conduction studies were normal and that he could find no abnormalities. Dr Poole also wrote to Mr P's GP explaining that "there were many inconsistencies in [Mr P's] history and examination and he struck him as being an unreliable historian". Dr Butt wrote on 10 May 2002 that Mr P had a full range of movement in his wrist and elbow and that he was unable to identify any abnormalities. Again, additional nerve conduction studies were normal.
 - There was no evidence that linked any of Mr P's conditions with the Index Incidents. He was referred for an assessment on his elbow by his GP who mentioned that his elbow was hindering his guitar playing, with no mention of a work-related injury/accident. The mention of a workplace related accident only began after he left NHS employment.
 - As Mr P's injury was not attributable to his time in NHS employment it was not necessary to consider a PLOEA.
 - It was more likely that Mr P's pain was related to a degenerative musculoskeletal condition that did not arise because of the Index Incidents.

The Pension Ombudsman's Position on Ill Health or Injury Benefits

37. When someone complains that they have not been awarded the ill health or injury benefit they think they should get, the Ombudsman looks at the way the decision has been reached.
38. The Ombudsman will not look at the medical evidence and make his own decision based on it, nor will he ask for more medical reports. The Ombudsman will consider whether the decision-maker has: (i) gone about making the decision in the right way (for example, whether only relevant factors were considered); and (ii) made a decision that makes sense based on the evidence (in essence, was it a reasonable decision).
39. The Ombudsman does not have to agree with the decision. He will not intervene just because he thinks the decision-maker could have reached a different decision.
40. The Ombudsman will look at whether the decision-maker has followed the scheme's rules or regulations. Different pension arrangements have different rules or regulations about ill health or injury benefits. For example, sometimes the

decision will be made by the employer, sometimes by the scheme's trustees or managers, and sometimes by a combination of these. The Ombudsman will look to see whether the right person has made the decision.

41. If the Ombudsman thinks the decision-maker has reached their decision in the wrong way, he will usually direct them to make the decision again in the proper way. For example, he may ask them to obtain more evidence.
42. The Ombudsman can also look at whether there was any maladministration, such as delay. If he finds maladministration, he may also award compensation for any non-financial injustice, such as distress or inconvenience.

Adjudicator's Opinion

43. Mr P'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 set out below:-
 - Allegations of fraud is a matter for the Police or the General Medical Council to consider. It is not within the Pension's Ombudsman remit to investigate. So, the Adjudicator was unable to investigate Mr P's claim that company doctors "altered" and "fabricated" his medical records to obstruct his PIB application.
 - The relevant regulations are Regulations 3 and 4, which provide that an injury benefit is payable if an individual has:-
 - sustained an injury, or contracted a disease, in the course of their NHS employment which is wholly or mainly attributable to that employment;
 - or
 - sustained an injury, or contracted a disease, which is wholly or mainly attributable to the duties of their NHS employment; and
 - by reason of the injury or disease, their earning ability is permanently reduced by more than 10%.
 - Under Regulations 3 and 4, the decision-maker, be it NHS BSA or its SMA (for the initial decision), was making a finding of fact. Mr P either satisfied the eligibility criteria or he did not. If he did, he was entitled to a PIB. In other words, there is no discretion to be exercised as to whether to pay a PIB if Mr P satisfies the eligibility criteria.
 - It is not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mr P's eligibility for payment of a PIB. The Ombudsman is primarily concerned with the decision-making process. The issues considered include whether the relevant regulations have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the relevant available evidence.

- Medical (and other) evidence is reviewed to determine whether it supports the decision made. However, the weight which is attached to any of the evidence was for NHS BSA to decide (including giving some of it little or no weight). It was open to NHS BSA to prefer evidence from its own advisers; unless there was a cogent reason why it should not or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant regulations by the MA. If the decision-making process is found to be flawed, the appropriate course of action was for the decision to be remitted for NHS BSA to reconsider. It was on this basis that the Adjudicator reviewed Mr P's complaint.
- Mr P did not provide any medical evidence in support of his PIB application or subsequent appeals and there were no occupational health reports to consider from Mr P's time in NHS employment. To determine Mr P's eligibility for a PIB award, each of the MAs extensively referred to the GP medical records.
- Mr P was seen/treated by his GP for a variety of ailments. These were, tennis elbow (left arm), possible epilepsy connected with seizures, left leg and lower back pain associated with sciatica. None of which were recorded by the GP as being related to, or caused by, the claimed Index Incidents. Mr P complained of pain in his left arm as far back as 1991, four years prior to his NHS employment. The GP records only referenced to Mr P's guitar playing, as opposed to an accident during his NHS employment, when commenting on the pain in his left arm.
- Mr P only mentioned a work-related injury to Dr Tambimuttu on 8 September 2003, when he said his "problems began in September 2001 when he sustained a fall whilst at work". Previously on 9 September 2002, Mr P told Dr Hagroo that he "did not recall any injuries to his elbow or wrist". Nonetheless, September 2001 was after Mr P had left NHS employment, following the TUPE transfer, and was working for Interserve.
- On 10 May 2001, Mr Butt said there were no abnormalities in Mr P's wrists/elbows and that he had a full range of movement. On 19 April 2002, Dr Poole said that Mrs P's nerve conduction studies were normal and that he could find no abnormalities. Furthermore, after a series of ECHO and MRI scans, in 2012, it was confirmed that there was nothing seriously wrong with Mr P's heart. The Second MA explained that there were many inconsistencies in the early stages of the investigations into Mr P's symptoms and Mr P's claims were based on his recollection of events rather than on any medical evidence.
- The Adjudicator took the view that each of the MAs asked themselves the correct questions, understood and applied the correct test for a PIB award, in accordance with the Regulations. It also appeared that the MAs had considered all the available medical evidence. So, there were no identifiable errors or omission of fact by the MAs in their consideration of Mr P's claim. There was no reason why NHS BSA should not have relied on the advice it received from the MAs. NHS BSA considered the PIB application in line with the Regulations and there was no reason to remit the decision back to NHS BSA to reconsider.

44. Mr P did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr P has provided his further comments which do not change the outcome.
45. Mr P has reiterated that his medical records have been forged by the Trust and NHS BSA to prevent him claiming for a PIB. Mr P says a report by the Parliamentary Health Ombudsman (**PHO**) supports his allegations of fraud.
46. I agree with the Adjudicator's Opinion and note the additional points raised by Mr P.

Ombudsman's decision

47. Firstly, Mr P maintains that his medical records have been forged to obstruct his PIB application. He has provided a report by the PHO responding to a complaint he raised in 2005. I have set this aside as the matter the PHO considered post-dates the complaint my office has accepted for investigation and, as the Adjudicator explained in his Opinion, fraud is a matter for the Police or the General Medical Council to consider, and sits outside of my jurisdiction and remit for investigation.
48. Turning now to the complaint accepted for investigation. I agree with the Adjudicator's Opinion that any injury or accident that Mr P sustained, was from September 2001 onwards, after his employment had been 'TUPEd' (i.e. transferred) from the NHS to Interservice. So, any PLOEA that Mr P may have experienced was not a consequence of his NHS employment.
49. Further, I agree that NHS BSA properly considered Mr P's PIB application in line with the Regulations and there was no reason why it should not have accepted the advice it received from the MAs.
50. As I have found no reason to remit the decision back to NHS BSA to reconsider, I do not uphold Mr P's complaint.

Dominic Harris

Pensions Ombudsman

1 December 2023