PO-19238

Ombudsman's Determination

Applicant	Mrs L
Scheme	NHS Injury Benefit Scheme
Respondents	NHS Business Services Authority (**NHS BSA**)

Outcome

1. Mrs L's complaint is upheld and to put matters right NHS BSA shall reconsider Mrs L's eligibility for PIB.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs L has complained that her application for a Permanent Injury Benefit (**PIB**) has not been considered in a proper manner.

Background information, including submissions from the parties

Background

4. The relevant regulations are The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended). Regulation 3 provides:

> "(1) … these Regulations apply to any person who, while he -
>
> (a) is in the paid employment of an employing authority …
>
> … sustains an injury before 31st March 2013, or contracts a disease before that date, 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 …"

5. Regulation 4 sets out the scale of benefits which may be paid and provides,

> "(1) Benefits in accordance with this regulation shall be payable by the Secretary of State to any person to whom regulation 3(1) applies whose earning ability is permanently reduced by more than 10 per cent by reason of the injury or disease …"

6. Mrs L was employed by the NHS until November 2013, when she retired on grounds of ill health. She applied for PIB in February 2015. Mrs L said she was suffering from "recurrent psychotic depression" which had been triggered by a move from a neurology ward to an acute stroke ward. In response to a request to provide details of the incident or events giving rise to her injury or disease, Mrs L referred to a "hostile atmosphere" on the new ward. She gave examples of incidents which she felt contributed to this. Mrs L said she had mentioned her previous mental ill health to the matron but did not feel that this was dealt with appropriately. She said she had suffered a breakdown as a result of her experiences on the new ward.

7. First instance decisions are made by NHS BSA's medical advisers, OH Assist. It notified NHS BSA, on 1 April 2015, that Mrs L's application had been unsuccessful. It quoted from the medical adviser who had reviewed the case:

> "… the Ombudsman has advised that the correct question to address in these cases (where there is a pre-existing condition) is what would have happened to someone similar who did not have it?
>
> It is more likely than not that any short term stress from the disruption would have ameliorated and no ill health effects would have resulted. It is the constitutional factor in this case that allowed the illness to re emerge."

8. Mrs L appealed under the Scheme's internal dispute resolution (**IDR**) procedure. NHS BSA issued a stage one decision, on 3 June 2015, declining Mrs L's appeal. It quoted from its medical adviser:

> "The evidence indicates significant pre-existing psychological vulnerability making her likely to react with significant symptoms of anxiety/depression to minor stressors. Considering the nature of the index injury and the severity of her underlying mental health condition it cannot be accepted that work related factors were wholly or mainly responsible for [Mrs L's] persistent symptoms."

9. Mrs L appealed further. NHS BSA issued a stage two IDR decision on 30 July 2015. It declined Mrs L's appeal and quoted from its medical adviser:

> "… It is accepted that perceptions about aspects of her work on the new ward acted as a trigger for psychological symptoms, however, in the absence of the underlying mental health condition it is not likely that the perceived stress factors would have led to symptoms of the severity described in the GP records. It is likely that the underlying constitutional condition has had a significant influence on her perceptions about aspects of her work. This

condition itself has not been caused by her work. It is advised that long term psychological ill health and related incapacity is wholly or mainly due to the long term underlying constitutional psychiatric condition. The attribution criteria for PIB are not advised met."

10. Mrs L applied to the Ombudsman in August 2015. At the time, certain cases relating to injury benefits payable under the Scheme were being placed on hold pending court proceedings. In November 2014, the Ombudsman had issued a determination which had been appealed by the applicant (Young v NHS Business Services Authority). The appeal succeeded on 8 July 2015. NHS BSA further appealed. The Court of Appeal rejected its appeal on 16 January 2017[1]. A summary of the judgment is provided in an appendix to this determination.

11. Following the appeal decision, NHSBSA agreed to reconsider those cases in line with the Court of Appeal's findings. Mrs L was content with this and we closed our file. However, NHS BSA then said that Mrs L's case was not one which it would reconsider because it was a case which had been decided under regulation 3. In its view, it was not, therefore, affected by the *Young* judgment. It considers this to be restricted to regulation 4 decisions only. As a result, we have had to reopen the matter for Mrs L.

Mrs L's position

12. Mrs L's submission is summarised briefly below:-

- She has a mental health disability and it is recognised that she needs to work with a supportive team.
- She experienced her initial breakdown in the NHS work place in 2003/04, just after she was promoted. However, she fully recovered from that and returned to work in the summer of 2004.
- She was moved from the eye to the neurology ward in December 2005. In March 2012 she was moved to the stroke ward where she found unacceptable standards of care, but she could do nothing to change this. She had told the matron in charge of the ward about her health condition because she felt pressured and wanted help. However, the matron kept this information to herself and did not inform the ward manager.
- She was off sick in July 2012, having had a complete breakdown during a late shift. She feels that the NHS, as her employer, failed in its duty of care to provide her with the appropriate support.

NHS BSA's position

13. The NHS BSA's original submission is summarised briefly below:-

[1] *NHS Business Services Authority v Young* [2017] EWCA Civ 8

- It refutes the allegation of maladministration and submits that it correctly considered Mrs L's application for PIB. It used the correct test, taking into account relevant evidence and ignoring anything irrelevant. In reaching its decision, it sought the advice of OH Assist.

- Mrs L acknowledges that a pre-existing health condition exists. Her claim is that, after she had approached the matron to ask for help and made her employer aware of her health problems, she was not cared for appropriately. She therefore asserts that her employer was negligent in its duty of care.

- NHS BSA cannot accept that Mrs L developed a psychological condition which is wholly and mainly attributable to her employment with the NHS caused by a failure of duty of care by her employer. It stands by its decision that she has a longstanding, recurring and severe condition and this is evident in the wide range of medical evidence on record.

- Mrs L's application has been considered three times in total. OH Assist at each stage of the application and appeals process noted the opinion of her GP. She reported that Mrs L suffers from a long history of chronic severe depression that is of a recurrent nature. The GP noted that the episode in 2012 was a recurrence of previous symptoms.

- Throughout her medical history, Mrs L relates her 2012 condition to her longstanding recurrent depression. She stated, in a letter dated 5 August 2012 to her GP, that her 2012 condition was "like last time" referring to the recurrence in 2004.

- The opinion is that the episode of the recurring pre-existing condition was triggered by the movement from one ward to another in 2012. Medical evidence shows that Mrs L was unsettled after her move. She lost her confidence and felt unable to cope with her role as staff nurse on the acute ward to which she had been moved.

- Mrs L complains that it failed to assess the extent to which the accepted injury exacerbated or contributed towards the acceleration of pre-existing health problems. The Ombudsman has previously acknowledged and accepted that a scheme does not cater for an exacerbation of a pre-existing condition, even if the exacerbation is wholly and mainly attributable to the NHS employment.

14. NHS BSA further submits:-

- Mrs L's application for PIB has been declined on the grounds that the requirements of regulation 3(2) have not been met; that is, it is not satisfied that Mrs L's claimed condition is wholly or mainly attributable to her NHS employment.
- Throughout the application and IDR process, it has maintained the decision that Mrs L's recurrent depression and anxiety is not wholly or mainly attributable to her NHS employment.
- The *Young* case turns on the interpretation of regulation 4(1) and permanent loss of earning ability (PLOEA). It does not affect cases in which it has determined that the applicant has not sustained an injury or contracted a disease which is wholly or mainly attributable to their NHS employment.
- In *Young*, the judge required it to consider whether the index injury was an operative cause of the applicant's PLOEA. The reference to "an operative cause of PLOEA" accepts that the resulting PLOEA might be the product of the work injury's impact or influence on the pre-existing injury where the work injury has exacerbated/accelerated the symptoms of the former.
- This approach presupposes that the index injury was, first and foremost, within the meaning of regulation 3(2).
- Where it agrees that the applicant has sustained an injury at work which is wholly or mainly attributable to their NHS employment, it must consider the impact on any pre-existing injury/condition.
- It does not accept that Mrs L has sustained an injury or contracted a disease wholly or mainly attributable to her NHS employment. Therefore, her case does not fall to be reconsidered in light of the *Young* judgment.

15. Having been provided with an opinion by one of our Adjudicators, NHS BSA provided further submissions, which are summarised below:-

- It did not accept that the *Young* judgment had any bearing on Mrs L's case. The *Young* judgment focused on the narrow issue of the statutory interpretation of regulation 4(1) and not regulation 3(2). The judge said:

  "The argument has centred on regulation 4(1). As appears from the text, regulation 4(1) provides that benefit "shall be payable by the Secretary of State to any person to whom regulation 3(1) applies", and, as I say, that is not in dispute …"

- The question which the High Court deemed to be incorrect was "NHS Pensions shall consider whether Mrs Young's work injury on its own (that is,

disregarding normal age related degeneration) has caused her to suffer a permanent reduction in her earnings ability of more than 10%". The judge said the question should have been what impact the injury would have had on Mrs Young, given her pre-existing condition.

- The question of interpretation relates to regulation 4(1); the parties having already accepted that the legislative requirements of regulation 3(2) were first met.

- In the Court of Appeal judgment, Flaux LJ said:

  "in the circumstances, before the judge and before this Court, the argument centred on regulation 4(1) and, specifically, the meaning and scope of the words: "by reason of the injury"."

  This was on the basis that, in that case, the pre-conditions in regulation 3(2) were satisfied.

- The *Young* judgment has not in any way changed its interpretation on regulation 3(2).

- In order for the requirements of regulation 3(2) to be met, it had to be satisfied that the injury sustained, or disease contracted, in the course of the individual's NHS employment was wholly or mainly attributable to their NHS employment or the duties of that employment. Wholly or mainly attributable meant it was the sole, main or predominant (more than 50%) cause.

- It does not agree that, in accepting the opinion of the OH Assist doctors, it has accepted that Mrs L sustained an injury which is wholly or mainly attributable to her NHS employment.

- Determining whether an injury is wholly or mainly attributable to NHS employment is in the main a clinical consideration based on the evidence presented.

- It does agree that it should separate the question of injury from the PLOEA.

- Mrs L applied for PIB on the grounds of recurrent psychotic depression, stating her most recent illness had been triggered by the move to an acute ward. It was, therefore, understandable that it and its medical advisers concentrated on the condition and the reason for Mrs L's ongoing incapacity.

- The Ombudsman had previously acknowledged and accepted that the wholly or mainly attributable test does not provide for exacerbation of a pre-existing condition; even if the exacerbation was mainly attributable to the NHS employment. It cites PO-1249 and 81606/1.

Adjudicator's Opinion

16. Mrs L'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:-

- Mrs L's application for PIB had been declined on the grounds that she did not meet the requirements of regulation 3(2); that is, her condition was not wholly or mainly attributable to her NHS employment. NHS BSA did not accept that Mrs L sustained an injury, or contracted a disease, which was wholly or mainly attributable to her NHS employment. It was on this basis that it sought to distinguish Mrs L's case from Mrs Young's.

- The Adjudicator acknowledged that NHS BSA had accepted that Mrs Young had suffered an injury which was wholly or mainly attributable to her NHS employment. Mrs Young had injured her neck and back whilst attending to a patient. That injury had caused ongoing back pain which prevented her from returning to work. An MRI scan had revealed that Mrs Young had degenerative changes to her spine which were more severe than would be expected for someone of her age. NHS BSA declined her application for PIB on the grounds that, had Mrs Young not had a pre-existing degenerative disease, the index incident would only have caused a temporary soft tissue injury which would have resolved in a few weeks or months.

- In the Adjudicator's view, NHS BSA had taken a similar approach in Mrs L's case. The first OH Assist doctor had expressed the view that, had Mrs L not had an underlying mental health condition, it was "more likely than not that any short term stress from the disruption would have ameliorated and no ill health effects would have resulted". At stage one of the IDR process, the OH Assist doctor was of the view that "pre-existing psychological vulnerability" made Mrs L "likely to react with significant symptoms of anxiety/depression to minor stressors". At stage two of the IDR process, the OH Assist doctor "accepted that perceptions about aspects of her work on the new ward acted as a trigger for psychological symptoms". However, he went on to say that "in the absence of the underlying mental health condition it is not likely that the perceived stress factors would have led to symptoms of the severity described".

- NHS BSA had said it did not accept that Mrs L had sustained an injury which was wholly or mainly attributable to her NHS employment. The evidence suggested otherwise. It did accept, inasmuch as it accepted the opinion of the OH Assist doctors, that the move to a new ward caused Mrs L stress, which triggered symptoms of anxiety and depression. However, it was of the view that the stress experienced by Mrs L would not have resulted in symptoms of such severity in someone who was not suffering from an underlying mental health condition. This was not the question NHS BSA should have been

asking. It should have separated the question of the injury (stress in Mrs L's case) from the consequences (PLOEA).

- It followed that Mrs L was entitled to have NHS BSA consider whether the stress she suffered on moving to the stroke ward satisfied regulation 3 (following *Young*); that is, whether the stress was wholly or mainly attributable to the ward move. If so, NHS BSA must then assess whether it caused a PLOEA in excess of 10% (regulation 4). This assessment must be undertaken given Mrs L's personal characteristics (as confirmed in *Young*), rather than how it would have impacted a hypothetical person not suffering from an underlying mental health condition.

- As the Court of Appeal had commented in *Young*, "the fact that the correct construction of the regulation may lead to a result which is the same as in the eggshell skull cases is no reason for not adopting that construction … If the regulation has been drafted in such a way as to have that consequence, the solution is not for the courts to read words into the regulation which are not there, but for there to be a legislative change".

- If NHS BSA nevertheless did wish to challenge this evidence, it would be entitled to do so. However, since that was not the reason given for Mrs L failing to satisfy regulation 3, it followed that NHS BSA's assessment process under this regulation was flawed.

- It was, therefore, the Adjudicator's opinion that the complaint should be upheld because Mrs L's PIB application had not been considered in accordance with the governing regulations. She suggested that NHS BSA should reconsider Mrs L's PIB application under regulation 3 and, if satisfied, regulation 4 and issue a fresh decision.

17. NHS BSA did not fully accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHS BSA provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion and my decision in response to the key points made by NHS BSA is set out below.

Ombudsman's decision

18. NHS BSA asserts that it must first be satisfied that Mrs L sustained an injury, or contracted a disease, which was wholly or mainly attributable to her NHS employment or the duties of that employment. I do not disagree.

19. NHS BSA asserts that the *Young* judgment does not assist because it was concerned with regulation 4(1); having been accepted that Mrs Young met the requirements of regulation 3(2). Whilst I acknowledge that the Courts were primarily focused on the interpretation of regulation 4(1), I do not agree that the judgment cannot then assist in interpreting regulation 3(2). Not least because one would expect there to be some consistency of interpretation throughout the regulations.

20. Regulation 3(2) provides for the regulations to apply to an individual who has sustained an injury, or contracted a disease, which is wholly or mainly attributable to his/her NHS employment or the duties of that employment. Mrs L has applied for PIB on the basis that the move to an acute ward caused an episode of recurrent psychotic depression. In other words, the move to the new ward caused her stress which triggered symptoms of anxiety and depression.

21. Regulations 3(2) and 4(1) call for a two-stage process. The first stage is for NHS BSA to determine whether Mrs L has sustained an injury which is wholly or mainly attributable to her NHS employment. The second stage is for it to determine the effect of the injury.

22. In the *Young* case, Nugee J referred to a previous case concerning the NHS injury benefit provisions[2] and subsequent commentary on that case. The case was, again, an appeal from a decision by the then Ombudsman. The commentary referred to by Nugee J noted that the word "injury" is not defined in the regulations. It suggested that it should bear its ordinary meaning of a physiological or psychological change for the worse. It was a "particular occurrence and should be kept separate from the loss of faculty or the impairment in the normal power or function of some part or organ of the body that might result from the injury either alone or in conjunction with other causes".

23. NHS BSA agrees that it should separate the question of injury from the question of PLOEA but the evidence does not suggest that it has done so in Mrs L's case. The approach it has taken so far in Mrs L's case is, in effect, to conflate the two stages.

24. The "injury" in Mrs L's case is the stress she experienced on being moved to a different ward. It might help to adopt an analogy. Mrs L sustained a psychological strain on moving to another ward in the same way as Mrs Young sustained a physical strain on lifting a patient.

25. The question, at that stage, was whether the stress was wholly or mainly due to Mrs L's NHS employment or the duties of that employment. I note that regulation 3(2) uses the phrase "wholly **or mainly**" (my emphasis) which indicates that her NHS employment does not have to be the sole cause of the injury. NHS BSA needed to determine whether Mrs L had experienced stress in 2012 which was, at least, mainly caused by her move to the acute stroke ward.

26. The OH Assist doctors acknowledged that Mrs L had experienced stress as a result of the ward move. However, they went on to express the view that the severity of her reaction to the stress was the result of a pre-existing psychological vulnerability. NHS BSA does not accept that Mrs L sustained an injury which was wholly or mainly attributable to her NHS employment on the basis that the stress she experienced would not have resulted in symptoms of the same severity but for her underlying mental health condition. But this is looking at the effects of the injury rather than

[2] *NHS v Suggett* [2005] EWHC 1265 (Ch)

answering the question posed by regulation 3(2); namely, whether there was an injury which was attributable to Mrs L's NHS employment.

27. The fact that Mrs L may have reacted more or less severely to the stress when compared to someone else is no more relevant to answering the question posed by regulation 3(2) than it is to assessing PLOEA under regulation 4(1).

28. I do not find that NHS BSA has considered Mrs L's eligibility for PIB in a proper manner. This amounts to maladministration on its part. Mrs L has suffered injustice inasmuch as it has yet to be established whether she is entitled to PIB.

29. Therefore, I uphold Mrs L's complaint.

Directions

30. Within 28 days of the date of this determination, NHS BSA shall reconsider Mrs L's eligibility for PIB. It shall ask itself the question: did Mrs L sustain an injury (stress) which was wholly or mainly attributable to her NHS employment or the duties of her employment? It shall do so without reference to Mrs L's underlying psychological health.

31. If the answer to the above question is that Mrs L did sustain a qualifying injury, NHS BSA shall consider whether, as a result, her earning ability is permanently reduced by more than 10%.

Anthony Arter

Pensions Ombudsman
16 March 2018

Appendix

NHS Business Services Authority v Young

32. Mrs Young had appealed a decision by the then Deputy Ombudsman (**DPO**), dated 28 November 2014, not to uphold her complaint that she should be awarded a PIB.

33. NHS BSA had accepted that regulation 3 was satisfied; in that Mrs Young had sustained an injury which was wholly or mainly attributable to her NHS employment. It did not accept that regulation 4 was satisfied. NHS BSA decided that the attributable incident would only have caused a temporary injury in an individual of Mrs Young's age who did not have a pre-existing degenerative back condition. It said it was Mrs Young's pre-existing back condition which was the cause of her PLOEA and this was not wholly or mainly attributable to her NHS employment.

34. The grounds of appeal were as follows:-

    - The DPO had misapplied regulations 3 and 4 of the NHS (Injury Benefits) Regulations 1995 in upholding NHS BSA's reconsidered decision because the advice from its medical adviser asked and answered the wrong question in law as to causation of Mrs Young's 100% PLOEA;

    - The DPO had failed to consider whether the index injury accelerated or exacerbated Mrs Young's underlying condition so as to contribute to her current 100% PLOEA by at least 10%;

    - It was perverse for the DPO to accept that the index injury made a 0% contribution to Mrs Young's 100% PLOEA.

35. Nugee J accepted Mrs Young's argument that the reference "by reason of the injury" found in regulation 4 should be given its ordinary meaning. He found there was nothing in the drafting of that specific regulation that precluded the notion that injury/disease could come from a combination of causes (such as a pre-existing injury) as opposed to a single, sole, determinant. It was sufficient for the attributable injury to be an operative cause.

36. Nugee J acknowledged that this interpretation could give rise to an anomaly; that is, an injury which was wholly or mainly due to employment but was only a contributory cause of PLOEA could nevertheless trigger the entirety of the benefit. He did not consider this sufficient reason to displace what he regarded as the normal use of the language. He then referred to the "eggshell skull" concept. He accepted that this was a rule applicable to the liability of tortfeasors but did not consider that meant it was inapplicable in Mrs Young's situation.

37. Nugee J agreed with Mrs Young's principle point of appeal that, in the context of the facts of her PIB complaint, the DPO had directed NHS BSA to ask its medical examiner the wrong question. He said:

> "… the question that should have been asked was not what impact the injury would have had on a woman of Mrs Young's age who did not suffer from degeneration of the spine, but what impact it had on Mrs Young, given her pre-existing condition."

38. NHS BSA subsequently appealed this decision. The appeal was dismissed.

39. The Court of Appeal held that, once it was accepted that the injury sustained by Mrs Young was wholly or mainly attributable to her NHS employment, Nugee J's construction of regulation 4 must be correct. Flaux LJ said:

> "The words 'by reason of' import a 'but for' test of causation: was the injury an operative or effective cause of the PLOEA. What they do not import is the construction for which the Authority contends, that the injury must be the effective or the operative cause. Such a construction seems to me to necessarily involve reading across the words 'wholly or mainly' from regulation 3(2) so that the provision reads: 'whose earning ability is permanently reduced by more than 10 per cent wholly or mainly by reason of the injury'. This rewriting of the regulation is wholly impermissible. The fact that the words: 'wholly or mainly' were added to regulation 3(2) by amendment in 1998 but those words were not also inserted in regulation 4 before: 'by reason of' prohibits any construction which involves reading those words into regulation 4."

40. Flaux LJ said it was important to bear in mind that Nugee J was not prejudging whether Mrs Young was entitled to a PIB; he was merely stating that her entitlement had not been properly assessed because the correct statutory question had not yet been asked. He acknowledged that it might emerge that, even if the injury had caused increased deterioration of Mrs Young's degenerative condition, it may always have deteriorated to the extent that she would not have been able to work.

41. Flaux LJ did not accept that Nugee J had applied a 'material contribution' test or that the eggshell skull principle formed part of his reasoning as to the correct construction of regulation 4. He said he read the reference to the eggshell skull principle as "no more than that the fact that the correct construction of the regulation may lead to a result which is the same as in eggshell skull cases is no reason for not adopting that construction". He considered this "plainly right" and said if the regulation had been drafted in such a way as to have that consequence, the solution was for there to be a legislative change; not for the courts to read words into the regulation which were not there.