PO-4525

Ombudsman's Determination

Applicant	Mr Laurence Lee
Scheme	Civil Service Injury Benefit Scheme (the **Scheme**)
Respondent(s)	Government Actuary's Department (**GAD**)
	MyCSP
	Scheme Management Executive (the **Cabinet Office**)

Complaint Summary

Mr Lee has complained that a reduction has been applied to his Permanent Injury Allowance (**PIA**); he also disagrees with the decision not to allow him a second appeal against the reduction applied to his PIA under the Scheme.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against GAD because they had no involvement in the decision to reduce Mr Lee's PIA or in the administration of the appeal.

The complaint should not be upheld against MyCSP, or the Cabinet Office, because there has been no maladministration on their part in deciding not to allow him a second appeal. Consequently, I do not need to consider his complaint that a reduction has been applied to his PIA.

Detailed Determination

Medical Review and Appeal Guide (the "Guide")

Sections 5.10.8 and 5.10.9 of the Guide states:

> "5.10.8 The following arrangement covers appeals about the medically assessed level of apportionment and/or level of earnings impairment for injuries sustained on or after 1 April 2003. All such appeals should be made through the APAC/employer, which calls on further advice from the medical adviser as part of the appeals process.
>
> 5.10.9 An appeal should be made within 12 months of the initial award decision. There is a limit of up to two appeals within this 12 month period. The second appeal may be notified up to and including the day the 12 month period ends – under these circumstances the appeal process may go beyond 12 months in its entire duration."

Material facts

1. Mr Lee was employed by GAD. He was being considered for a PIA and his case was referred to Capita Health Solutions (**Capita**), in their role as the Scheme's medical advisers.

2. On 10 December 2010, Mr Lee received a copy of Capita's report, dated 25 November 2010, setting out the level of impairment assessment.

3. On 5 January 2011, the amount of the PIA was calculated and sent for checking.

4. In January 2011, the amount of the PIA was confirmed by MyCSP and GAD was informed of the annual amount payable. GAD were asked to arrange for Mr Lee to complete the necessary forms so that the PIA could be put into payment.

5. Also in January 2011, MyCSP had a telephone conversation with Mr Lee to discuss Capita's report. MyCSP say that during the course of this conversation he asked if he could appeal against the decision and he was informed that an appeal could be lodged but it must be made within 12 months of the date of Capita's report. He was also informed that the appeal must be supported by medical evidence and he was sent a copy of the Guide.

6. Towards the end of January 2011, MyCSP sent Mr Lee an email agreeing that an error had been made in calculating the PIA and informing him of the new amount. They asked him to complete a new set of forms as the amount had been corrected.

7. Correspondence continued between MyCSP and Mr Lee, and in March 2011, the amount of his PIA was recalculated three times.

8. Around 10 March 2011, Mr Lee expressed his intention to appeal the level of the PIA rate. He was informed that he had until November 2011, to do this.

9. On 13 May 2011, Mr Lee emailed MyCSP asking about the review and the new medical evidence he needed to submit for the appeal against the PIA. MyCSP responded on 17 May 2011, as follows:

> "Unfortunately, all your files have been returned to your employer and everything they sent me originally was forwarded to Capita Health Solutions.
>
> Capita will only review the case with fresh robust medical evidence. If this goes over the 12 month period, we will refer this in good faith. However, it is up to you to obtain this new evidence."

10. In June 2011, Mr Lee emailed Capita concerning the information he needed from them in order to complete his appeal.

11. On 11 July 2011, Mr Lee emailed MyCSP his appeal against the level of PIA that was awarded to him. MyCSP replied saying that they had received his files and would be looking at this first appeal against the level of PIA, and would refer the case to Capita.

12. On 19 September 2011, MyCSP sent Mr Lee's papers to Capita for their consideration.

13. On 6 October 2011, Mr Lee telephoned MyCSP to inform them that he had received the report from Capita in response to his appeal against the level of PIA.

14. On 14 October 2011, Mr Lee emailed MyCSP saying that he intended on obtaining the appropriate medical evidence to have his case reviewed again by Capita and asked to be informed of the time limits to make such an appeal. MyCSP responded by email on the same day saying that the date on the original report was 25 November 2010, and the usual time limit is 12 months from this date. However, as they did not receive Capita's report until December 2010, they would ask Capita to review the matter if he had not obtained the information by November 2011.

15. Mr Lee says that he did not receive MyCSP's response to his email of 14 October 2011.

16. On 13 November 2012, Ormerods, Mr Lee's solicitors wrote to MyCSP saying that he wished to lodge an appeal against the reduction of his PIA award by 40%, they had medical evidence which supported the appeal and the grounds for the appeal would follow shortly. MyCSP answered saying that they were unsure what reduction Ormerods were referring to. They said that if Mr Lee wished to appeal the level of apportionment used in the permanent injury benefit calculation, the deadline for this was 25 November 2011. They pointed out that Mr Lee was advised that he would only get 12 months to appeal the level of impairment/apportionment.

17. On 4 December 2012, Ormerods wrote to MyCSP, enclosing a copy of MyCSP's email of 13 October 2011, to Mr Lee and his email to them of 14 October 2011, asking if there was a time limit, to which they say he did not receive a reply.

18. MyCSP responded to Ormerods enclosing copies of documents which they said showed they had informed Mr Lee on numerous occasions about the timescales for appealing the PIA decision. They pointed out that a copy of Capita's report which Mr Lee had received when he applied for a PIA clearly stated at the bottom that the member is entitled to a maximum of two appeals within 12 months. Mr Lee had up until 25 November 2011, to appeal the decision. They did advise him that as they did not receive the report until December 2010, they were willing to refer the appeal until the end of December 2011. As it was now December 2012, he was outside the 12 month period.

19. Ormerods sent a letter by fax to MyCSP referring to the email of 17 May 2011, in which MyCSP state: "if this goes over the 12 month period we will refer this in good faith". They said that this email constituted an extension of time upon which their client was expected to rely in order to obtain new evidence. Having extended their client's time or in effect waived an extension to enable him to get the evidence, MyCSP could not retrospectively withdraw that concession.

20. MyCSP responded to Ormerods saying that they apologise if their email of 17 May 2011 was misleading. What they should have made clear was that they would give Mr Lee until the end of December 2011, to submit further medical evidence due to the delay by Capita in returning the file to them. They did not have the authority to issue an extension for a late appeal. Whilst they did advise him that they would refer the application back to Capita in good faith, there was no guarantee that Capita would have considered this outside the timescales.

21. Ormerods wrote to MyCSP saying that the email of 13 October 2011, amounts to a notification of a second appeal. They pointed out that the rule is: "Any appeal should be made within 12 months…" but "A second appeal may be notified…". Giving written notice within the time limit of an intention to make a second appeal with new medical evidence is sufficient to start the process. Therefore, their client has not delayed; alternatively his time has been extended as indicated in their letter of 14 December 2012.

22. In another letter to MyCSP, Ormerods said, that whether or not the email of 17 May 2011, reflected what MyCSP wanted to say at the time, their client relied upon it. MyCSP could not attempt to revoke the extension and concession that they made. They have been granted an extension of time and it is trite law that it cannot be withdrawn.

23. MyCSP wrote to Ormerods saying that they can agree to extensions to appeal deadlines for injury benefit in rare cases in which serious procedural errors have occurred. Where there are exceptional circumstances an extension is possible, but this is normally a matter of weeks. Mr Lee was sent the conditional injury benefit award letter on 28 January 2011 and this stated what timescales apply, including the second appeal deadline. The second appeal period can begin at any point up until the end of the 12 month period starting with the initial award decision.

24. Mr Lee made a complaint which was dealt with by MyCSP and the Cabinet Office under stages one and two, respectively, of the internal dispute resolution procedures (**IDRP**).

25. MyCSP's decision under stage one IDRP was as follows:

    - The rules of the Scheme govern the payment of benefits and they have no authority to alter the rules.
    - They are not persuaded by the contention that Mr Lee relied solely on the contents of the email of 17 May 2011, because prior to it they had exchanged numerous emails with him and sent him a copy of the Guide which clearly stated that he had 12 months from the date of the initial decision.
    - His email of 14 October 2011, was some four and a half months after the email of 17 May 2011, requesting details of the time limit, which demonstrates that at that time he was still unsure of the deadline.
    - They had replied to his email of 14 October 2011, which he says he did not receive. They are surprised that having not received a reply to his email, he did not contact them again to request a response because this information was crucial to him organising and submitting his second appeal and the appropriate supporting medical evidence.
    - He was informed that he could submit his second appeal up to December 2011, because it was acknowledged that due to a delay by them in receiving Capita's report it affected the length of time in which he had to lodge his appeals.

26. The stage two IDRP decision was given by the Cabinet Office and upheld the stage one decision.

Summary of Mr Lee's position

27. The first stage of his appeal was not properly conducted because:

    - Dr Collins did not produce any analysis to assess how she arrived at the 'low' level apportionment, awarding him 60% of the full benefit.
    - Dr Deacon agreed with Dr Collins' apportionment, again, without any explanation on how that apportionment was determined.
    - Dr Deacon did not provide any explanation on how disconnected earlier episodes of depression were a material factor in his case to reduce his benefits.
    - MyCSP, as decision maker, failed to question Dr Deacon, instead accepting his comments without seeking legal opinion of the reports from Capita on the matter of apportionment and this amounts to maladministration.

28. MyCSP made an erroneous statement in their email to him of 10 March 2011, with respect to what the Guide said.

29. MyCSP's subsequent email to him of 17 May 2011, seemed consistent with the Guide and is self-contained to override completely any reasonable interpretation of what they said in their 10 March 2011 email. In addition, this email did not suggest that he needed to get the new medical evidence before the "12 month" period.

30. MyCSP failed to keep him informed that his first appeal had not been sent immediately to Capita. In addition, they failed to enquire about the progress of his obtaining new medical evidence.

31. MyCSP made a concession in respect of filing medical evidence which was not withdrawn and upon which he relied on to his detriment. Therefore, as a matter of law, they are estopped from resiling from that concession.

32. Had MyCSP indicated to him that the concession was to be withdrawn, he would have acted accordingly.

33. In subsequently seeking to withdraw the concession as to time for service of medical evidence, MyCSP has acted both irrationally and perversely.

34. Both Capita and MyCSP had already departed from the Guide by not referring the matter back to him to obtain new medical evidence in a more timely way with the first appeal. He was, therefore, entitled to seek further clarification in his email of 14 October 2011.

35. The information sent to him by Capita at the end of May 2011, in respect of his first appeal was in total disarray. There were also considerable delays on the part of MyCSP and Capita in dealing with his first appeal.

36. It is not open to MyCSP to rely on their own administrative errors when much of the 12 month period was taken up with factors that were completely outside of his control and were the responsibility of MyCSP and Capita.

37. He did not receive MyCSP's email of 14 October 2011, which was in response to his email of the same date. The first time he became aware of this was when MyCSP wrote to his solicitors on 7 December 2012.

38. Even if he had received MyCSP's email of 14 October 2011, it does not help them because it is clear that he relied on the extension of time. MyCSP "represented by clear words that new medical evidence would be accepted outside the 12-month time limit" and, therefore, they should be estopped from subsequently going back on that promise.

39. Had he received the email purportedly sent by MyCSP on 14 October 2011, he would have replied at once as it would have been impossible for him to obtain a proper

independent medical report from one of the few experts in the field before the Christmas holidays.

Summary of Government Actuary's Department's position

40. Mr Lee has not been employed by them since 31 October 2010.

41. The decision on whether a person suffered an injury and the level of compensation awarded are solely made by MyCSP. In addition, the administration of appeals relating to PIA is undertaken by MyCSP. Therefore, they have been erroneously named as respondents.

Summary of MyCSP's position

42. Their position is the same as that set out in their stage one IDRP decision and upheld in stage two decision by the Cabinet Office.

43. In summary, Mr Lee failed to submit his appeal before the deadline expired, despite being advised of it on numerous occasions.

44. Mr Lee contends that the reduction to his injury award should be set aside retrospectively. The rate of the award is set within the framework of the Scheme and is determined by Capita. His appeal was referred to Capita in 2011 and it was determined by Capita that it should stand in the report dated 2 October 2011.

Conclusions

45. Mr Lee's complaint is in two parts: the first part is about the reduction that has been applied to his PIA; and the second part is about the refusal to allow him a second appeal against the reduction applied to his PIA.

46. The decision to reduce Mr Lee's PIA and the administration of an appeal is the responsibility of MyCSP. GAD have no involvement in these matters. Therefore, I do not find maladministration on the part of GAD and do not uphold the complaint against them.

47. If I was to decide that Mr Lee's second appeal should have been considered, then I will need to consider the first part of his complaint, ie the reduction applied to his PIA. However, if I was to decide that it was not maladministration to refuse his second appeal, then I do not need to consider the first part of his complaint.

48. Mr Lee has said that the first stage of the appeal was not properly considered. The first stage of the appeal is against the decision to award him a reduced PIA. If I was to consider the first stage of the appeal, I would in fact be considering the first part of his complaint. As I have stated above, I do not need to consider this part of his complaint if I was to decide that it was not maladministration to refuse his second appeal.

49. Therefore, I shall start by dealing with the second part of Mr Lee's complaint, ie the refusal to allow him a second appeal. He was informed during a telephone conversation in January 2011, that he had to lodge an appeal within 12 months of the date of Capita's report, ie within 12 month of November 2010. He was also sent the Guide which informed him of this. Again in March 2011, he was told that he had until November 2011, to lodge his appeal. Mr Lee does not dispute any of this.

50. To succeed with a defence of estoppel by representation, Mr Lee needs to establish an unambiguous representation on which he relied in good faith to his detriment. These requirements were elaborated in the case of Steria v Hutchison [2006] 64 PBLR. In that case Neuberger LJ said:

> "When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it."

51. Whilst MyCSP did say in their email of 17 May 2011, that the position set out in the previous correspondence with Mr Lee - including the Guide - would not be strictly adhered to, their statement that they would refer fresh medical evidence submitted later than the expiry of the 12 month period "in good faith" did not suggest that evidence submitted after a further 12 month delay would be referred. Indeed, the submission that they would refer evidence submitted beyond the 12 month deadline in "good faith" was suggestive that only evidence submitted shortly after the expiry of the 12 months would be referred. It follows that whilst there was a promise in MyCSP's email of 17 May 2011, that what they had said previously would not be strictly adhered to, the specific extent of that promise was clearly misinterpreted by Mr Lee. It follows that Mr Lee has not acted in reliance of the promise actually made by MyCSP. Instead, he has acted (or, claims to have acted) on the basis of an incorrect interpretation of that promise. It follows that an estoppel by representation has not arisen as a consequence of MyCSP's email of 17 May 2011.

52. I am also satisfied that an estoppel by convention has not arisen as a consequence of MyCSP's email of 17 May 2011. In brief, an estoppel by convention may arise where the parties to a transaction act on the basis of a common assumption as to fact or law so that it would be unjust to allow one of the parties to go back on it. Case law has established that the common assumption shared between the parties upon which the estoppel is based must be understood by the parties in the same way and

expressly shared between them. There is no common assumption between Mr Lee and MyCSP which was understood by them in the same way. MyCSP's email of 17 May 2011, suggested that if there was a slight delay in the production of evidence they would refer it to Capita; as expressed previously, a delay of 12 months was not envisaged by MyCSP. MyCSP's statement that they would refer fresh medical evidence "in good faith" was an indication that only evidence submitted shortly after the deadline would be referred. There was, therefore, no common assumption shared between the parties as to the length of the extension of the timing of filing the evidence beyond the 12 month deadline.

53. MyCSP had, in their email of 17 May 2011, offered to pass on any new medical evidence Mr Lee may submit to Capita if they received it after November 2011. This was not an open-ended concession and, given the provisions of the Guide, it was only meant to allow him an additional month or so after the deadline to provide the necessary information.

54. Mr Lee subsequently sent MyCSP an email on 14 October 2011, querying the time limits to make an appeal. MyCSP did respond on the same day, but he says that he did not receive their email. MyCSP's response was that the time limit was 12 months from the date of Capita's report. However, as they did not receive Capita's report until December 2010, they would ask Capita to review the matter if he was unable to obtain the information by November 2011.

55. I am satisfied that MyCSP did respond to Mr Lee's of email on 14 October 2011. It is possible that he did not receive their email for a number of reasons – for example he may have accidentally deleted the email or it may have ended up in his junk email folder. Whatever the reason, given that he did not receive a response to his email, it would be reasonable to expect him to have chased MyCSP for a reply, but he did not.

56. Mr Lee says that even if he did receive MyCSP's response on 14 October 2011, he had clearly relied on the extension of time granted in their email of 17 May 2011. This begs the question that if he did rely on email of 17 May 2011, why did he query the matter in October 2011? He was clearly aware that there was a deadline of 12 months from the date of Capita's report of November 2010. For him to have relied on MyCSP's email of 17 May 2011, the extension would have to be open-ended and I cannot agree that it was. As I have stated, I believe the extension was only meant to be a month or so after the deadline.

57. The email of 10 March 2011, from MyCSP to Mr Lee was not incorrect. It said that he had until November 2011, to lodge his second stage appeal and this was consistent with the Guide. The email of 17 May 2011, was merely giving him an extension of a short period to allow him to lodge his appeal and provide the necessary medical evidence.

58. For the reasons given above, I am unable to find maladministration on the part of MyCSP, and the Cabinet Office and, therefore, do not uphold the complaint against them.

59. As I do not uphold the second part of Mr Lee's complaint, I do not need to consider the first part of his complaint.

60. Mr Lee's solicitors, Ormerods, have submitted a request for me to hold an oral hearing. The purpose of an oral hearing is to assist me in reaching my determination. Circumstances in which a hearing may be appropriate include where there are differing accounts of a particular material event and the credibility of witnesses needs to be tested; where the honesty and integrity of a party has been questioned and the party concerned has requested a hearing; or where there are disputed material and primary facts which cannot be properly determined from the papers. I do not consider that any of these circumstances apply here so I do not consider it necessary to hold one in this case.

Anthony Arter

Pensions Ombudsman
22 July 2015