CAS-51729-B5T5

Ombudsman's Determination

Applicant	Mr O
Schemes	Principal Civil Service Pension Scheme (**the Scheme**) Civil Service Injury Benefit Scheme (**CSIBS**)
Respondents	Cabinet Office MyCSP Her Majesty's Prison and Probation Service (**HMPPS**)

Outcome

1. Mr O's complaint is partly upheld. To put matters right, for the part that is upheld, HMPPS shall pay Mr O the award which was directed by Cabinet Office in November 2016. It shall also pay him pay him £1,000 for the serious distress and inconvenience caused by the misinformation given and for the oversight identified. MyCSP shall pay Mr O £500 in respect of the significant distress and inconvenience caused by no satisfactory reason being given for the initial PIB assessment only considering Mr O's PTSD.

Complaint summary

2. Mr O's complaint concerns MyCSP's handling of his respective Ill Health Early Retirement (**IHER**) and Permanent Injury Benefit (**PIB**) claims.

3. Specifically Mr O says:-

- He was initially assessed under the wrong pension scheme for IHER, which caused a delay in benefits being paid to him.

- His initial PIB application did not take into account his back injury.

- It was subsequently confirmed to him that he needed a Sick Leave Excusal (**SLE**) to be able to apply for PIB (in relation to his back injury), so he applied for this through his employer.

- After over a year of chasing his former employer/the governor at his former workplace, he was eventually able to obtain a SLE. However, he was then out of time to appeal his PIB decision.

- MyCSP later clarified that he did not need a SLE to apply for PIB in relation to his back injury. He had therefore been given incorrect advice.
  Employment Support Allowance (**ESA**) and Industrial Injuries Disablement Benefit (**IIDB**) had wrongly been deducted from his PIB award.

- He had been advised by MyCSP to relinquish ESA and IIDB, but he was now worse off. These benefits being taken away from him meant that he had not been able to access healthcare in Spain, where he now resides.

Background information, including submissions from the parties

4. 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.

5. Mr O joined the Prison Service in February 2006 and was admitted to the premium section of the Scheme.

6. In March 2013, Mr O attended to a prisoner who had committed suicide.

7. Between 2012 to 2015, Mr O applied to his employer, the National Offender Manager Service at the time (consistently referred to here as HMPPS for ease) for several periods of SLE in respect to back pain he experienced whilst carrying out his duties.

8. In September 2014, during fire training at work, Mr O injured his back after pulling a life-sized dummy out of a prison cell. Mr O was absent from work because of this injury between 11 September 2014 to 9 November 2014.

9. In October 2014, Mr O met with his GP whose view was that Mr O had presented symptoms of Post-Traumatic Stress Disorder (**PTSD**).

10. On 1 April 2015, Mr O moved to the alpha section of the Scheme.

11. On 21 July 2015, a Consultant in Accident & Emergency Medicine, Dr Hunt, produced a report on Mr O's back injury. This stated that Mr O was likely to suffer a recurrence of his symptoms, that he would need to be careful with his back, and that he may be limited in his ability to work in the Prison Service.

12. From 15 September 2015, Mr O was on long-term sick leave due to the PTSD he was suffering following the incident in 2013.

13. On 13 January 2016, Mr O was sent a letter from the Department for Work and Pensions (**DWP**) confirming that he was entitled to IIDB.

14. In February 2016, Mr N was dismissed from HMPPS due to medical inefficiency.

15. In March 2016, Mr O completed applications for the benefits of IHER and PIB.

16. In a letter of 17 March 2016 from HMPPS about the separate matter of Mr O's medical inefficiency appeal, the following is noted:

> "I have also made some further enquiries in relation to your application for SLE and Injury Benefit.
>
> I have spoken to [governor name] and he has confirmed that your SLE has been referred to Health Assured…He has advised that your original paperwork was lost but he has also acknowledged that there was a delay in sending your application to Health Assured which he takes full responsibility for. I apologise for this delay which I have also taken into account in my consideration of the compensation awarded."

17. In regard to Mr O's IHER application, HMPPS submitted an application request to the Scheme Medical Adviser (**SMA**) for the classic section of the Scheme.

18. The SMA's report, of 19 April 2016, referenced Mr O's psychiatrist's opinion that his PTSD was likely to continue. The SMA, Dr Gallagher, concluded that Mr O was prevented by ill health from discharging his duties and that this would likely continue until scheme pension age. He said that the criteria for IHER was likely to be met.

19. On 24 April 2016, Dr Gallagher, issued a IHER certificate for the classic section of the scheme.

20. Following Mr O's employment appeal, his records were subsequently changed to reflect that he left employment on the grounds of medical retirement (rather than being dismissed due to medical inefficiency). His last day of service was 9 May 2016.

21. MyCSP subsequently realised that Mr R should have been assessed for IHER under the alpha scheme. On 18 May 2016, MyCSP contacted Mr O's employer asking it to correct the error concerning Mr O's IHER certificate and issue the correct one.

22. On 8 June 2016, another SMA, Dr Saravolac, issued a lower tier alpha IHER certificate. Mr O was paid a pension lump sum on 17 June 2016 and then paid his first pension payment, plus arrears, on 21 June 2016. Mr O's regular pension payments began in July 2016.

23. Mr O subsequently raised a complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**) about the errors that had been made during his IHER application.

24. On 17 June 2016, HMPPS contacted Mr O saying:

> "I have contacted Health Assured to find where we are they are [sic] with chasing the release of the payments to your GP. Your GP requested £90 for payments and this was sent off on the 13 June.
>
> I have looked into why it had taken so long for the IB and SLE, it seems that the person who put in the requests to Health Assured had moved teams and on longer works for NOMS thus was not receiving the notification that Health Assured was trying to contact them [sic] how they would like to progress with your case.

> So far the reports Health Assured have are only from when your application was made and anything which is older than 6 months is considered out of date…"

25. On 30 June 2016, MyCSP responded under stage one of the IDRP. In respect of the error where Mr O was assessed under the classic section of the Scheme, MyCSP said:

> "I have obtained a copy of the report which was issued to HMPS [Her Majesty's Prison Service] Shared Services by Health Assured on 19 April 2016. This letter raises the issue that there were two Ill Health Retirement applications. These were, an application under classic section of the PCSPS (29 February 2016) and an application under alpha (19 May 2016). Initially, the medical assessment was based upon classic and a classic medical certificate was issued. It is clear that in fact you had never been a classic member (having joined the PCSPS in February 2006) and were therefore a member of the premium section. From this, I can determine that had the correct scheme been shown on the application, then it is reasonable to expect that the correct medical certificate would have been issued instead of the incorrect classic certificate.
>
> To support this analysis, HMPS have confirmed that the referral made on 29 February 2016 to Health Assured incorrectly referenced the classic section of the PCSPS. This led to you being incorrectly assessed under classic terms and subsequently a classic medical certificate being issued by Health Assured on 19 April 2016. Another referral was made to Health Assured on 19 May 2016, after MyCSP had questioned the validity of the classic medical certificate. The correct alpha medical certificate was received on 15 June 2016."

26. MyCSP concluded that the medical assessment by the SMA took 50 days in total but on the basis that Mr O's last day of service was 9 May 2016, an earlier issuing of Mr O's medical certificate would not have led to an earlier finalisation of these benefits. It said that nonetheless, Mr O had experienced delays; it had instructed HMPPS to make an ex-gratia payment of £100 to him.

27. Mr O appealed this. He said:-

- His respective applications for SLE made on 26 November 2015 and 5 January 2016 had been lost by his employer.
- His application for injury benefits, submitted on 12 February 2016, had been lost by his employer.
- His application for medical retirement had been submitted on 12 February 2016 and was completed over four months later.

28. On 10 August 2016, the SMA considering Mr O's PIB application sent an impairment assessment report to MyCSP stating that Mr O had a qualifying injury in respect of his PTSD. The degree of impairment was assessed at 25%-50%.

29. On 12 September 2016, MyCSP confirmed to Mr O's employer that he would be paid a PIB award of £2,184.31 from 10 May 2016.

30. On 17 September 2016, Mr O wrote to Cabinet Office to say his original IHER certificate for the classic section of the scheme awarded him a lump sum of £65,000 and a pension of £14,000. The subsequent IHER certificate he received only awarded him a lump sum of £23,000 and a pension of £3,000. He felt financially secure and relieved when he received the initial offer; this changed when it was withdrawn.

31. On 19 September 2016, Mr O's application for a SLE for the period 15 September 2015 to 14 March 2016 was approved.

32. On 18 October 2016, Dr Hunt completed another report on Mr O's back condition. Dr Hunt stated that Mr O would be unable to do activities which involved any lifting or bending, but this might change were he to have treatment which eased his symptoms.

33. In November 2016, Mr O forwarded the report from Dr Hunt to MyCSP. Also, Mr O's PIB annual allowance was increased to £5,997.68.

34. Around this time, DWP sent a letter to Mr O confirming that his ESA, which began on 1 February 2016 at a weekly rate of £102.15, had ended on 3 November 2016.

35. On 27 November 2016, Cabinet Office responded to Mr O's complaint under the second stage of the IDRP. The main points were:-

    - In terms of a delay in paying Mr O's IHER benefits, the aim was to pay these as soon as possible after a member's last day of service. Where there had been an unreasonable delay, interest would be paid on the delayed lump sum.

    - Mr O's last day of service was 9 May 2016 but his lump sum medical award was not paid until 17 June 2016. The loss of interest due to Mr O for the 39 days of delay was £12.43, which rounded up was a figure of £13.

    - The £100 ex-gratia payment offered at stage one should be increased to £250.

    - In respect to Mr O's claim that he had been quoted a higher IHER award under the classic section of the scheme, the figures he gave could not be corroborated. Mr O was not entitled to IHER benefits in the classic section of the Scheme and his application had to be considered under the rules of the alpha scheme.

    - It had been unable to obtain papers from Mr O's employer in relation to his SLE and PIB applications, therefore it could not determine whether and to what extent these had been delayed. Mr O had said he submitted his first PIB application on

12 February 2016 which had been lost. However, the application MyCSP received on 15 April 2016 was signed by Mr O on 10 February 2016 and he signed a form on 22 February 2016 agreeing to the release of medical papers. Mr O submitted further evidence in support of his application in March and April 2016. Hence, there did not appear to be any significant delay in processing the application.

- Mr O's employer must pay him £250 for distress and inconvenience plus the £13 financial interest figure in respect of his delayed lump sum.

36. Mr O says he realised in July 2017 that none of his awards included his back injury, despite the fact that he had provided numerous occupational reports on this. He says that he contacted SSCL, the human resources (**HR**) provider for the Ministry of Justice (which is part of HMPPS), about re-applying for PIB in relation to his back injury. Mr O says he was told that because the Scheme's occupational health provider had been changed to Health Management, his medical records were no longer available.

37. Mr O says that in August 2017, he completed a new application for a PIB in relation to his back injury.

38. On 27 September 2017, SSCL wrote to the Injury Benefit Team at MyCSP asking it to consider Mr O's PIB application in relation to his back problems.

39. On 14 February 2018, the SMA wrote to MyCSP to obtain clarification on Mr O's injury benefit application, referring to the period 11 September 2014 to 9 November 2014.

40. Also, around this time, Mr O submitted another complaint under the IDRP. He said that incorrect processes were followed for both his IHER and PIB applications, as his back injury had not been considered. He also said that HMPPS had delayed/ refused to grant a period of SLE despite the fact that he had a qualifying injury.

41. On 5 March 2018, the SMA produced a report on Mr O's temporary injury benefit application (for the period 11 September 2014 to 9 November 2014). Mr O's last day of service was noted as 2 January 2015. The SMA's conclusion was that the medical criteria was likely satisfied for the period in question and the responsible condition was a soft tissue injury on pre-existing degenerative changes in the lower back.

42. On the same date, the SMA produced a report on Mr O's PIB application. The SMA's conclusion was as follows:

> "Subsequently, in my opinion, it would be reasonable to conclude that the estimate of the degree to which the general earning capacity has been impaired only by the effect of the injury sustained through the causal incidents are likely to be less than 10%. Any impact that ongoing back complaints is likely to have on the level of impairment of earnings in my opinion and on the balance of probability is likely to be due to the degenerative disease affecting his spine."

43. Mr O's PIB application was therefore not successful.

44. On 6 March 2018, MyCSP responded under stage one of the IDRP to Mr O's complaint. The main points were:-

- In respect of Mr O's PIB appeal, this award was designed to compensate members who would not be able to work up to their expected retirement age in the same capacity due to an injury or condition sustained at work.

- The SMA's advice from 10 August 2016 had been obtained and it was noted that the nature of Mr O's injury was listed as PTSD; there was no reference to his back injury. It appeared that Mr O's back injury was not considered by the SMA when assessing his application.

- In order to apply for PIB, a CSIB1 form must be completed by both the member and their employer; with the member completing part one and the employer completing part two. In part two, employers are required to provide details of the injury or disease sustained. In part two of the form submitted on behalf of Mr O, the nature of his injury was stated as PTSD and no reference was made to his back condition. In light of this, it was reasonable that the SMA only assessed the condition stated in this form. So, this part of the complaint was not upheld.

- Mr O's back condition was assessed by the SMA in relation to his application for SLE. SLE was not a provision of the CSIBS or any part of the Civil Service pension arrangements and was instead a provision under the Civil Service Management Code. However, the process for applying for SLE was similar to that of injury benefits. So, there may have been some confusion on the part of HMPPS as to whether his back injury had already been assessed for PIB. However, this was only speculative and it was unable to confirm whether Mr O's employer was responsible for any maladministration in respect of Mr O's PIB application.

- Mr O could submit a separate PIB application in respect of his back injury. It understood that this had now been submitted.

- In regard to Mr O's IHER application, he had previously received stage one and two determinations in respect to delays.

- A covering letter provided with the IHER certificate, dated 6 June 2016, detailed the reasons for the SMA's decision and the medical evidence considered. The documentation included reports forwarded to the IDRP team on 2 January 2018, in particular Dr Hunt's report of 12 July 2015 which related solely to Mr O's back injury.

- Most of the letter focused on Mr O's PTSD diagnosis. Hence, it was understandable that Mr O believed his back injury was not correctly considered as part of the SMA's evaluation. The IDRP could not comment on the SMA's evaluation of any medical evidence that had been submitted; only that it has been considered as part of their assessment. The 6 June 2016 letter indicated that

medical evidence relating solely to Mr O's back injury was considered as part of the IHER assessment. The complaint was not upheld.

45. Mr O appealed the stage one IDRP decision.

46. On 6 April 2018, MyCSP sent the following email to SSCL:

> "I am writing in regards to [Mr O] and his Sick leave excusal injury benefit application for the absence from 11 September 2014 to 9 November 2014 due [sic] a back injury.
>
> As [Mr O] applied for a permanent injury benefit award due to his back injury we were required to assess the period of absence (above) before the permanent could be assessed.
>
> As HMPS process their own sick leave excusal's [sic] I have not provided [Mr O] with any details regarding this absence. Please find attached the medical advice report from our scheme medical advisor regarding his period of absence relating to his back injury, please take any necessary action that is required.
>
> We will issue a letter to you and [Mr O] with the outcome for the permanent injury benefit application."

47. On the same date, MyCSP wrote to Mr O about his PIB application concerning his back injury. It said:

> "We have fully considered all the information provided, and the medical assessment made by [sic] Scheme Medical Adviser and we are unable to accept that you qualify for a benefit under the scheme.
>
> As the degree of impairment of your earning capacity has been assessed as less than 10%, we cannot approve your application.
>
> Please note that the application was made to consider the impairment of earnings for your back injuries. A permanent injury benefit award is already in payment to you for a separate injury and will remain in payment. However, there will be no changes to the value of the award in payment as a result of the assessment shown above.
>
> …
>
> The formal Injury Benefit appeal procedure has only one stage, but you can make up to two separate appeals, so long as both are made within 12 months of the date of your original permanent injury benefit decision letter."

48. On 16 April 2018, SSCL sent Mr O the following email:

> "I have just spoken to MyCSP regarding the outcome of your Injury Benefit Award Application in relation to your back injury.

> They confirmed that you can appeal this decision within 12 months of the outcome. With regards to the attached report which the Scheme Medical Adviser prepared with regards to your sickness absence from 11th September 2014 to 9th November 2014, MyCSP advised that they prepared this report for you as this absence has not been granted 'Sick Leave Excusal' and is therefore not classed as being a qualifying Injury. This would mean that they would not have been able to take this absence into consideration when assessing your Injury Benefit Award Application for your back injury.
>
> You can either apply for Sick Leave Excusal for the absence period mentioned above first before appealing your Injury Benefit Award Application, this would mean that if your SLE was approved that the Scheme Medical Adviser would then be able to take in to account this absence period when they re-assess the application. The other option would be to appeal the Injury Benefit Award outcome now and/or apply for Sick Leave Excusal.
>
> Please let me know how you would like to proceed so that we can send you the relative [sic] documentation and provide you with the necessary guidance."

49. According to Mr O, later that month he submitted an application for SLE for the period 11 September to 9 November 2014 to SSCL as advised, however, despite chasing this, the matter did not move forward.

50. On 2 October 2018, the Cabinet Office responded under stage two of the IDRP. The main points were:-

- Employers may grant SLE where advised by an SMA that the injury is a qualifying one, however this was not a provision under the Scheme. Any decision on SLE was an employment matter and not within the remit of the Cabinet Office.

- MyCSP's recent stage one decision had highlighted the errors made in the handling of his IHER and PIB applications. Although this would have been frustrating, it did not affect the medical decisions the SMA had to make. On the contrary, the delays meant that Mr O was able to submit further medical reports in 2018 which he would not have been able to before.

- In respect to Mr O's IHER application, the medical evidence listed included reports about Mr O's back condition. In regard to Mr O's PIB application, MyCSP agreed that the assessment only referred to PTSD. The SMA then reviewed Mr O's injury benefit application assessing whether there was any further impairment due to his back injury.

- The SMA's conclusion was that Mr O's back injury was a qualifying injury but that the degree of impairment was less than 10%. The SMA explained that Mr O had 12 months in which to appeal.

- Having considered the papers, there was nothing to suggest that the SMA did not take account of all the relevant medical evidence. Further, they did not consider

anything irrelevant and the delays did not influence their decision. The decision was reasonable.

51. On 17 October 2018, Mr O's osteopath, Dr Gea, prepared a report following his appointment with him the day before. The key points were:-

- Mr O's recent MRI report found mild Lumbar Spine degeneration at the L3-L4 segment. This early degeneration would have been exacerbated by the traumas he had suffered between 2009 to 2014 at HMPPS.
- This type of injury happened as a result of twisting, lifting and pushing; the movements Mr O would have been doing when the traumas occurred.
- The incidents that happened at HMPPS caused Mr O several back injuries and were the cause of him being in severe constant pain.
- Mr O's pain was more than likely to be there past his pensionable age and the sacroiliac joint dysfunction in his pelvis will worsen.

52. On 12 December 2018, an SMA, Dr Collins, completed her assessment of Mr O's PIB appeal. The medical evidence considered included three reports from specialists (including Dr Gea's report of 17 October 2018), two GP reports, notes from occupational health consultations, plus other reports. The conclusion was that the extent to which Mr O's earnings had been permanently reduced as a result of the qualifying injury was less than 10% (see Appendix 1).

53. MyCSP wrote to Mr O in respect of his PIB appeal on 4 February 2019. It said the degree of impairment of his earning capacity had been assessed at less than 10%, so his application could not be approved.

54. On 16 July 2019, HMPPS authorised SLE for Mr O for the period 11 September 2014 to 9 November 2014. In this form, the reason for Mr O's absence is stated as "BAD BACK."

55. Mr O's representative however chased this on 23 July 2019 by contacting the Chief Executive of HM Prison and Probation Service. He said the governor had not sent information to SSCL to say whether he was supporting Mr O's SLE.

56. Mr O subsequently complained to MyCSP about the delay in his Governor granting his SLE. On 25 November 2019, MyCSP replied under stage one of the IDRP saying that SLE was a pay matter and not within its remit.

57. Mr O subsequently referred the matter to The Pensions Ombudsman (**TPO**).

58. On 1 July 2020, Mr O added:

> "I must add that because I was advised to relinquish IIDB, ESA in favour of Civil service injury benefit living abroad this has prevented me in being able to access PIP [Personal Independent Payment] benefit from DWP as you can

only get PIP abroad if your [sic] in receipt of either IIDB or ESA and I can't access them because my case is closed.

I qualify for PIP hence they awarded me £1400 in 2018 but no continued PIP.

I would received [sic]:

£120 ESA per week

£70. IIDB per week

£90 PIP. Per week"

59. On 9 March 2021, MyCSP sent a letter to Mr O saying that it would need to revise his PIB allowance as the incorrect amount had been deducted from his award and an arrears payment was due to him. The letter included a statement setting out its calculations for various periods between 2016 to 2020. For the earlier part of this period, it is apparent that ESA was deducted from his annual allowance entitlement.

60. On 24 March 2021, the Cabinet Office provided its response to the complaint on behalf of MyCSP, HMPPS and itself, to my Office. The main points were:-

- Mr O's employer had confirmed that at a dismissal appeal meeting, it was recorded that his absence from 15 March 2015 was attributed to PTSD. It said Mr O's records at the time he left service showed his absence was solely due to PTSD.

- SLE was a pay matter and not a pensions matter. SSCL had been approached for comments and said it had confirmed in an outcome letter dated 17 March 2016 that Mr O's delayed SLE application was actioned and that the previous SLE paperwork had been mislaid.

- MyCSP said that whilst Mr O was outside the time limits for an appeal against his original PIB award, he could make a separate PIB application in respect of his back injury. Mr O made an application and on 5 March 2018, the SMA released her report. She determined that the degree of apportionment was 50-70% attributable, and the degree of impairment was less than 10%. Mr O therefore did not qualify for a PIB in respect of his back injury. This did not affect his PIB for PTSD.

- Mr O appealed against the SMA's latest decision and on 12 December 2018, another SMA gave their assessment. Mr O had the opportunity to submit a further appeal but did not. He then made a complaint directly to the SMA using the 'Med09' complaint procedure. On 7 June 2019, the SMA confirmed that there was no record of a second appeal.

- Mr O had also expressed his unhappiness that ESA and IIDB payments would be deducted from his PIB award. It was understood that he did not claim those benefits because they would reduce his PIB entitlement. He was correct that the

statutory scheme rules require such payments to be deducted from injury allowances (Civil Service Injury Benefit Scheme, rule 1.8(iii)). The fact that he did not claim these for such reasons was due to his own choices.

61. On 12 April 2021, SSCL provided its comments to my Office:-

- Mr O was employed by the Ministry of Justice and SSCL has a contract to provide payroll and HR services to them. The Ministry of Justice provided instructions to SSCL in this regard. SSCL did not have any decision-making influence.

- In respect to Mr O's IHER application, SSCL processed his application as instructed by Mr O's employer. The application was sent to SSCL on 3 May 2016 with a leaving date stated of 9 May 2016. The IHER certificate was sent to MyCSP with the illness stated as PTSD on 3 May 2016.

- Regarding Mr O's SLE application, this fell on his employer/ the governor. SSCL received Mr O's SLE application on 11 July 2019 which was approved for the period 11 September 2014 to 9 November 2014. Although Mr O wanted all his absences excused, his governor did not approve.

62. On 14 April 2021, Mr O provided the following comments in reply to Cabinet Office's response:-

- He disputed that he was absent from work from 15 March 2015 due to PTSD. He had reviewed his SSCL sickness file and he did not visit his GP in respect to his mental health until September 2015.

- In respect of comments made by an Occupational Health Nurse, he did not agree that these comments should be solely used when determining whether his back condition met the criteria for PIB. In June 2015, he was assessed by Dr Hunt, who said that his back condition was a degenerative condition and that the injuries sustained whilst employed by the prison service exacerbated this condition. This was proven in a more recent report by [Dr Gea], Osteopathic Consultant. Had his SLE paperwork been completed in a timely manner then there would be additional evidence available to Occupational Health to make a more informed decision.

- Whilst he was aware that SLE is not a pensions matter, he was also aware that it formed the initial stage of an application for injury benefit. He understood that it was kept on record and could be referred to if an injury benefit award relating to that specific injury was actioned at a later date. Therefore, not having this paperwork had been detrimental to his application regarding his back injury.

- There were two separate SLE applications. The one referred to as actioned was in relation to his PTSD. The other application was in relation to his back injury. There appeared to be some confusion surrounding these two applications, which had resulted in the assumption that things had been actioned when in fact they had not. The SLE for his back injury took four years to complete.

- At the time of the March 2018 PIB report, he had not received a response regarding his SLE application in respect of his back injury. This could have been a contributory factor in not awarding him PIB.

- In respect of the 12 December 2018 PIB decision, he did contact SSCL to initiate a further appeal. He was told unless he had a SLE from his original back injury, he would not be successful in his appeal. Once he had the SLE he had been chasing, he was out of time for an appeal. Also, he would have been required to produce fresh medical evidence and he did not have the funds for this.

- He was in receipt of IIDB and ESA from February 2016 until he moved to Spain in January 2017. These benefit amounts were being deducted from his PIB award. After moving to Spain, he was advised by a MyCSP representative that he should stop claiming these benefits as it would be in his interest to have these amounts paid as part of his PIB, which he did. He had since learned that this was not the correct advice as the benefits he was receiving entitled him, as a medically retired British citizen, to medical cover in Spain. He recently had resumed his IIDB but he had to gain another private medical report at the cost of £900.

- He was unable to restart ESA as he was no longer living in the UK. He had been advised by DWP that he would have been entitled to an ESA amount of £106 per week if he had not stopped this benefit. Further, whilst he was claiming it, it should have not been deducted from his PIB as it was not a means tested benefit. The IIDB he was currently in receipt of had caused his monthly PIB to be reduced by around £290 per month.

63. On 23 April 2021, MyCSP sent the following email to Mr O:

> "I refer to your emails received in relation to a recent revision of your Injury Benefit (IB) award.
>
> I understand following a revision of your award we identified that an incorrect amount had been deducted from your award in respect of your Civil Service Pension, as a result of the revision you were due an arrears payment, which I trust you have now received.
>
> In relation to your request for compensation, and the matter surrounding interest on monies owed to you, whilst there is no provision for payment of interest in the scheme rules, in some instances we may offer an ex-gratia payment.
>
> Following referral to Senior Management, we would like to offer you an ex-gratia payment of £500.00 to you in settlement of your complaint.
>
> This offer is made in full and final settlement of any claims by you in relation to the complaint and is made without any admission of liability. If you wish to accept this offer please sign and return the attached form and payment of £500.00 will be made to the account specified in the form."

64. Mr O did not accept the ex-gratia award due to concerns of whether it would affect his complaint with TPO.

65. Mr O made the following further comments:-

> "I have been given some advice reference the section of my claim about DWP (ESE [sic] contribution based and IIDB)
>
> a previous case raised by Mrs E on the 20th July 2017, ref PO-14710 highlights the wrong deduction being made.
>
> This has now been amended, [sic]
>
> But not when I was claiming both ESA contribution based and IIDB in Feb 2016 and would still be claiming both but was [sic] it would be easier for me to stop, which I know now is the wrong information, I now have a lifetime award of IIDB at £75 per week but as I live in Spain now I have lost the opportunity to claim ESA because of wrong advice."

66. As part of the Adjudicator's investigation, Mr O said that he never received Cabinet Office's November 2016 stage two response nor any payment for distress and inconvenience or financial interest.

67. Also, as part of the Adjudicator's investigation, MyCSP was asked for any call records it had relating to its conversation with Mr O, in which he claims he was advised by one of its representatives to cease his IIDB and ESA benefits as he would be better off. MyCSP advised that such calls are not recorded, so it has no record. Also, the representative Mr O says he spoke to said:

> "Upon receipt of your email I have looked back at my involvement with [Mr O's] case administration and have noted that I did complete [sic] IDR stage 1 investigation for him which was completed in June 2016. This determination was issued following my investigation into delays around finalisation of his Ill Health pension award. I do recall that I spoke to the member during that investigation and may have spoken to him after the determination was issued. However, my focus was on [sic] response to the particulars detailed within IDR stage 1 application form and I have had no direct involvement with Injury Benefits administration, any queries related to any other ongoing matters where relayed to another team for their attention."

68. Mr O's comment in response was:

> "… it was definitely [name of MyCSP representative] we spoke a few times over phone after my IDR as he was the only contact I could get a [sic] instant reply from.
>
> He told me exactly what I have said before that in his opinion its [sic] better for me to stop receiving my DWP benefits because the injury benefits will increase and its easier for me that way because I am moving abroad."

69. The MyCSP representative was approached again for his comments on this specific matter. His further reply was as follows:

> "I have produced a report from our correspondence system which notes contact with [Mr O].
>
> There are notes on 15/6/2016 relating to the ill health quote which was the focus of the IDR1 that I was writing, the IDR1 case itself was completed 30/6/2016.
>
> The only other contacts after that appear to have been in January 2017, when the member was looking to change his address. [Mr O] was having issues in getting sufficient documentary evidence to prove the change, he was going to be renting a property in Spain. The final contact that I had was on 4 May 2017, when the member called to enquire about his pensions increase, which I passed on to the appropriate team for a response.
>
> There is no record of any contact with me during October 2016."

70. Mr O's final comments on ESA and IIDB being deducted from his PIB are:

- He is in receipt of a lifetime IIDB award and this is continually being deducted from his injury benefit. There were several reasons why this should not be the case.
- IIDB is a non-means tested benefit and is taxable. Other government agencies do not have IIDB deducted from their PIB; it appeared that prison officers in receipt of PIB were the only service still having IIDB deducted.
- There is a misconception that the IIDB scheme is providing another benefit with the purpose of supplementing or replacing income. IIDB is a tax-free separate compensation payment (for paying no-fault compensation). It is not income replacement. The misnomer of IIDB being termed a "benefit" had meant that this no-fault compensation had resulted in the loss of means tested benefits for many.
- The Pensions Ombudsman case of PO-707 which had been Determined was very similar to his case and there were other similar cases.
- There were also instances relating to the Police Pension Scheme where IIDB was being wrongly deducted from PIB.
- There seemed to be confusion generally (as highlighted by researchers /lawyers) for decades about the purpose of IIDB. This highlighted that IIDB had been misunderstood as a scheme and that this uncertainty was longstanding.
- In respect to ESA, he understood there might not be any proof that he was advised to stop this benefit. However, importantly, it is because he was advised to stop this benefit that it could not be reinstated while he was living in Spain despite this being an exportable benefit (which it would have been until the UK's

withdrawal from the European Union on 31 December 2020). If this benefit was never stopped, he would be entitled to an amount of over £100 every week.

- Prison Officers that were still working were receiving awards of IIDB for life without losing any salary. This was not fair to someone in his position.

71. Finally, MyCSP offered Mr O £250 for the distress and inconvenience caused for not providing a complete response to Mr O on why his initial PIB only included his PTSD.

Adjudicator's Opinion

72. Mr O's complaint was considered by one of our Adjudicators who concluded that further action was required by HMPPS. The Adjudicator's findings are noted as follows:-

- In respect of Mr O's complaint that his IHER application was initially assessed under the incorrect section of the Scheme, this being the classic section rather than alpha, in April 2016, MyCSP issued a IHER certificate for the classic section of the Scheme and in June 2016 the correct certificate was issued. It transpired that the referral made to Health Assured in February 2016 incorrectly referenced the classic section. Although the error was unfortunate, the impact of it was small and appropriate remedial action was taken. Mr R's award could not be paid until 9 May 2016 in any case which was his last day of service. Mr O was paid his IHER award not too long after in June 2016 and this payment was paid with arrears. Further, Cabinet Office subsequently directed that financial interest be paid for the delay. Therefore, Cabinet Office took appropriate steps to ensure that Mr O was no worse off financially by this error and delay.

- Mr O had said that his benefits for the classic section were significantly higher and had expressed his feelings of disappointment and a lack of financial security when learning of the corrected award. Cabinet Office however had not been able to corroborate these figures. If Mr O was told of a higher award initially, the key principle was that Mr O could only be paid in accordance with his correct entitlement. Under the IDRP, Cabinet Office increased Mr O's award for distress and inconvenience to £250, taking into account the effect the error had on Mr O's mental health. This was an appropriate figure for the error given that it was corrected fairly swiftly.

- With regard to Mr O's initial PIB assessment only taking into account his PTSD and not his back injury, MyCSP had said it was unsure why exactly this happened. It said there might have been some confusion between Mr O's respective PIB and SLE applications.

- The outcome of Mr O's PIB application for his back, which was eventually submitted, was that he did not meet the criteria for this benefit. Therefore, the delay did not cause him any financial loss requiring backdating. Mr O said that the delay possibly caused the unfavourable result and that perhaps he would have

been entitled to a higher PIB entitlement had his back injury been assessed alongside his PTSD. Importantly however, this could not be known for certain.

- In any case, Mr O finding out that this his back injury had not been included would have been disappointing and stressful for him. MyCSP, at stage one of the IDRP in 2018, said it was unable to ascertain the root cause of this error. Mr O's employer would likely be the party most likely responsible (for the omission of Mr O's back injury) given the process. SSCL ought to make an award for the distress and inconvenience this oversight would have caused Mr O.

- Separately, MyCSP had offered an award to Mr O for leaving a key part of its investigation incomplete in failing to establish which party was liable for this error. This was an appropriate offer.

- In respect of Mr O being told that he needed a SLE for his PIB application, on 16 April 2018, a representative for SSCL informed Mr O that he did not have a SLE for the period 11 September 2014 to 9 November 2014, so it was not classed as a qualifying injury and was not taken into consideration for his PIB application. The suggestion by SSCL was: "You can either apply for Sick Leave Excusal for the absence period mentioned above first before appealing your Injury Benefit Award Application, this would mean that if your SLE was approved that the Scheme Medical Adviser would then be able to take into account this absence period when they re-assess the application. The other option would to be to appeal the Injury Benefit Award outcome now and/or apply for Sick Leave Excusal."

- SSCL's communication would have given Mr O the impression that he would need to apply for SLE in order for his back injury to be considered as part of his PIB application. MyCSP and Cabinet Office later clarified that this was not correct. That being said, given that SLE was not necessary and considering the points made within the SMA's reports, there was no reason to believe that the absence of a SLE contributed to Mr O not being successful in his PIB application (and subsequent appeal) for his back injury. However, the misinformation did cause Mr O to take action that was not necessary. Further, the SLE took a long time to chase and caused needless aggravation for Mr O, particularly when considering his mental health condition. SSCL ought to pay Mr O an award for the distress and inconvenience this would have caused.

- Mr O had said his belief that he needed a SLE (and the delay in obtaining this) caused him to miss his appeal window. The initial PIB assessment was carried out on 6 April 2018 and Mr O was entitled to make two appeals within a 12-month window. The outcome of his first appeal was in December 2018. Mr O technically had until April 2019 to submit a second appeal. His SLE application was not approved until July 2019.

- Although Mr O's position was understood, he had also said that he did not have the funds to obtain fresh medical evidence, which was a requirement to appeal.

Therefore, it appeared that Mr O was not in a position to submit a second appeal regardless of the SLE issue.

- With regard to the PIB assessment itself, Dr Collins' PIB assessment of December 2018 was the main document for consideration. When considering injury benefit complaints, the role of TPO is not to replace the decision reached by the decision-maker but to assess whether the correct process was followed.

- In considering how the decision in relation to Mr O's PIB application had been made, it would be taken into account whether: the correct questions had been asked; the applicable scheme rules or regulations had been correctly interpreted; all relevant and no irrelevant factors had been taken into account; and, the decision arrived at was supported by the available relevant evidence.

- From the report of December 2018, it was clear that the form directed Dr Collins to determine the correct considerations in accordance with the CSIBS rules, these being in respect of the degree of impairment, causation and attributability. Dr Collins had carried out an assessment in accordance with the correct questions.

- Dr Collins' report considered the most recent medical evidence alongside older evidence. Dr Collins' overall view was that it was unlikely that Mr O's current symptoms stemmed from the qualifying injuries and instead, were from pre-existing degenerative changes. Hence, Mr O's earnings capacity was not impaired by the effects of the injuries sustained by the causal incident, by the degree needed. Although this was not the outcome Mr O was seeking, Dr Collins considered all relevant factors and arrived at a reasonable decision. This part of the complaint could not be upheld.

- In respect of applications lost by Mr O's former employer and his having to chase his governor for a SLE, this was not a pensions matter so could not be considered. In any case, Mr O had been somewhat compensated already for the applications initially lost through the compensation awarded as part of his medical inefficiency appeal.

- Mr O had said he understood that having to chase the governor for a SLE was not a pensions matter but pointed out that this did affect his PIB. The specific matter in relation to his PIB had been considered.

- Another complaint brought by Mr O was that he had been advised to give up ESA and IIDB by MyCSP. Mr O had also said that he had been limited in accessing healthcare in Spain due to not being in receipt of ESA.

- It was unfortunate that MyCSP did not have any record of the call in question as this would have helped in understanding what was discussed. Mr O's recollection differed to that of the MyCSP representative that he liaised with. As there was no evidence that Mr O was advised by MyCSP to give up his ESA and IIDB benefits, it was difficult to make a finding on this. However, notably, it was not within MyCSP's remit to advise. This part of Mr O's complaint could not be upheld.

- In regard to Mr O's complaint that ESA should not have been deducted from his PIB, he had argued that the rules did not allow for ESA to be deducted from his PIB annual allowance. He had referred to case PO-14710 which was Determined by the previous Deputy Pensions Ombudsman. In that case, Cabinet Office sought to argue that ESA replaced Incapacity Benefit; the rules provided for the latter to be deducted from an injury pension. It was Determined that the legislation in question did not permit Mr E's ESA to be deducted from his injury pension, so MyCSP was precluded from doing this.

- Mr O received ESA from 2016 to 2017. The rules in question at that time did not expressly list ESA as a deductible benefit. Following Determination PO-14710, the Cabinet Office took steps to amend the Civil Service Injury Benefit Scheme 2002 rules to include deductions for ESA. The Civil Service Injury Benefits Scheme (Amendment) Scheme 2019 (**the 2019 Scheme amendment**) was laid before Parliament on 18 July 2019 pursuant to sections 1 and 2 of the Superannuation Act 1972**.** It had direct effect as it related to the treatment of ESA on injury benefits (see Appendix 2).

- In sub-paragraph (e) of the amended rule 1.8(iii) of the 2019 Scheme amendment: "employment and support allowance" was cited. Hence, ESA was expressly provided for in the amended rules, so Cabinet Office could deduct ESA from a PIB.

- The next question was whether the 2019 Scheme amendment had retrospective effect. Under the Citation and Commencement of the 2019 Scheme amendment, it stated that "the Scheme" shall come into operation on 18 July 2019. It then stated that Paragraph 2 of the Schedule shall have effect from 27 October 2008. This paragraph directly related to rule 1.8(iii) and ESA, meaning that the amendment to rule 1.8(iii), which clarified the benefits to be taken into account when calculating the amount of benefit payable under the CSIBS, applied retrospectively to 27 October 2008. The Explanatory Note stated: "The amendment to rule 1.8 takes effect from 27 October 2008, the date when Employment and Support Allowance was introduced. Retrospective amendment is permitted by section 2(4) of the Superannuation Act 1972, and under section 2(3) the persons consulted in accordance with section 1 of the Act have agreed to the inclusion of the provisions."

- Mr O's ESA began being deducted in 2016. As this period was after the retrospective amendment, Cabinet Office had acted within the CSIBS**'** regulatory framework in deducting ESA and had not made an administrative error.

- Mr O had also made reference to rules applying to other public sector schemes, for example, the Police Pension Scheme. He had also specifically referred to a decision in respect to the police pension scheme in Northern Ireland (PO-707), Determined in October 2013 by the then Deputy Pensions Ombudsman. However, only the Rules which applied to the CSIBS were relevant and other schemes were not comparable.

- Additionally, Mr O had argued that IIDB was different to other benefits and was being misconstrued in respect to the type of benefit it fell under and in regard to its purpose. He had provided arguments for the basis of the IIDB scheme and why deducting it was not intuitive/ in the spirit of the scheme. These were policy arguments however and would be for the government or legislators to consider.

- Mr O had also argued that IIDB should not be deducted from PIB. However, for similar reasons to that regarding ESA, IIDB was a deductible benefit. With reference to the new Rule 1.8(iii) of the 2019 Scheme amendment, under sub-paragraph (a), "industrial disablement benefit" was stated. Therefore, IIDB was expressly included within the Rules as a deductible benefit. While the deduction of ESA was more recently included in the Rules (with retrospective effect), Rule 1.8(iii) of the CSIBS 2002 Scheme rules, as originally drafted, provided for IIDB already: "1.8(iii) the annuity value or the annual value, as appropriate, of any rights which have accrued or probably will accrue from the injury by way of industrial disablement benefit, sickness benefit, invalidity pension or incapacity benefit…" Hence, Cabinet Office was correct to have previously treated, and was currently correct in treating, IIDB as a deductible benefit.

- Lastly, in April 2021, MyCSP wrote to Mr O in relation to his PIB saying it had identified that an incorrect amount had been deducted from his injury benefit so he was due arrears. It offered him an ex-gratia award of £500 in recognition of this error.

- Mr O was unsure about whether to accept this. As this matter was separate to that which formed part of Mr O's original complaint to TPO, no comment could be made on it. However, Mr O accepting (or rejecting) the award would not affect this complaint.

- HMPPS ought to check whether the £250 award for distress and inconvenience and the £13 award for loss of interest that Cabinet Office directed on 27 November 2016, was in fact paid. If it was not paid, HMPPS should make arrangements for the payment to be made now.

- HMPPS also ought to pay Mr O £1,000 in recognition of the serious distress and inconvenience caused to him by SSCL misinforming him that he needed a SLE for his PIB application and for its oversight in excluding Mr O's back injury in its referral of his initial PIB application.

- It remained open to Mr O to accept or reject Cabinet Office's offer of £250 for the distress and inconvenience caused to him for not providing a complete response on why his initial PIB assessment only included his PTSD.

73. Cabinet Office, MyCSP and HMPPS accepted the Adjudicator's Opinion but Mr O did not and he made the following points:-

- The award being offered was "miniscule" when considering he had paid well over £1,000 for medical reports despite the matter not being his fault. He had had

written statements from his previous employer and supporting agencies stating that they did delay/lose/mislay paperwork, causing him to need to seek another medical report (in relation to his back).

- He was unhappy that his position, on being advised by MyCSP to stop DWP benefits, was not believed. MyCSP has an answering service that states all calls will be recorded but conveniently, they could not find his recording. The main question was: why would he stop benefits he was entitled to?

- He wished for me to provide a medical opinion to the complaint regarding his initial application. His complaint was that if both his conditions were assessed together, as per his first PIB application for PTSD and his back injury, these combined would have gained a higher impairment percentage than when he was awarded for PTSD alone. It was worth remembering that it had been admitted that his first application for PIB had been lost.

- Why had he not been awarded anything for the distress caused to him by Health Assured for mislaying his medical paperwork? This had taken him over the 12-month timeframe which meant that he had to obtain another medical report at his own cost.

- Why had MyCSP not been severely reprimanded for underpaying him for over five years? He acknowledged that they had paid him now but for five years he was in financial distress.

74. Mr O's representative also made the following representations on his behalf:-

- In MyCSP's stage one IDRP response of 6 March 2018, it had said that Mr O's back condition was assessed by the SMA in relation to his SLE. It added that the process of applying for SLE was similar to that of injury benefits so there might have been some confusion on HMPPS's part as to whether his back injury had already been assessed for a PIB, so it could not confirm whether HMPPS was responsible for any maladministration.

- This confusion, as it was being labelled, was typical of HMPPS as it did not understand the pension scheme its employees were enrolled in; those involved had no training. SSCL was at times frustrating and its lack of will to chase things up was "a constant thorn" in a member's side. SSCL was aware of the difference between a PIB and SLE and the outcome reached on maladministration ought to be contested. Ignorance could not be a defence when it came to the financial future of a scheme member who was medically discharged from the service. It was the employer's duty to ensure it had given the correct information to both the Scheme Manager via MyCSP and its outsourced HR company.

- This delay and misinformation led to Mr O missing the opportunity to appeal decisions made on his back injury. Also, he was not financially able to provide further medical advice which would have given "further thought to the SMA's deliberation." This was maladministration by both the employer and SSCL.

- In respect of Mr O's complaint that MyCSP advised him to give up ESA and IIDB, the Adjudicator had said that Mr O's recollection on this had differed to the MyCSP representative. She added that as there was no evidence that Mr O was advised by MyCSP to give up these benefits, it would be difficult to make a finding on this. What needed to be asked was why would Mr O give up these benefits if he had not received such advice from his pension provider?

- It was not accepted that there was no recording of these conversations. MyCSP must be aware of the consequences of its actions.

- The sums awarded were not reflective of the stress Mr O continued to experience. He is an injured member of HMPPS who, as a result of this injury, lost his job. He had been met with "constant red tape" when trying to obtain answers. His employer had treated him with contempt and had been dismissive of his attempts to rectify his access to pension justice for him and his family.

- The procedure throughout Mr O's complaint had been poorly handled which led to his bringing the matter to TPO, where he was also met with unproven answers in defence of decisions made.

- Mr O was dismissed on the grounds of Ill health due to his employment which was PTSD. Over the time that he had dealt with Mr O's case, he had watched his mental wellbeing decline.

75. The complaint has been passed to me to consider. I agree with the Adjudicator's Opinion except in respect of MyCSP's offer of a £250 award regarding the distress and inconvenience caused by there being no proper explanation why the initial PIB only addressed his PTSD. I have decided to increase the award as I find that the distress and inconvenience was significant. I will though respond to the additional points made by Mr O and his representative.

Ombudsman's decision

76. I appreciate that this has been a long-running matter for Mr O which has caused him a considerable amount of upset, anxiety and disappointment. However, my role is to assess whether there has been maladministration causing injustice and if so to direct an appropriate remedy.

77. Broadly speaking, there are three main parts to Mr O's complaint. The first is that he is unhappy with the outcomes of his PIB assessments. The second is the respondents' handling of his IHER and PIB applications (and any appeals). The third concerns the administration and payment of the benefits which he is or has been in receipt of.

78. For the same reasons as those given by the Adjudicator, I do not find that Mr O's PIB assessment was procedurally flawed and I therefore make no direction in this regard.

79. Mr O has said that he wishes for me to provide a medical opinion on the PIB application he initially submitted where he intended for both his PTSD and back injury to be considered at the same time.

80. It is not within my remit to provide a medical opinion. My role is to consider the matter procedurally. It is not disputed that Mr O's back injury was initially omitted from consideration; Mr O was given the opportunity to submit a PIB application for this specific injury to address this oversight.

81. Mr O has not been successful in receiving a PIB in relation to this injury and feels that a higher impairment percentage would have applied had his PTSD and back pain been assessed together. But these are different conditions which would have been considered separately against the PIB criteria. Dr Collins' view was that Mr O's back symptoms did not stem from the qualifying injuries previously recognised but from a pre-existing degenerative change. She determined that the extent to which Mr O's earnings had been permanently reduced as a result of his qualifying injury was less than 10%. There is nothing to suggest that Mr O's back injury would have been assessed at above the 10% impairment threshold should it have been considered alongside his PTSD. I believe Mr O is making too simplistic an assessment here.

82. With respect to the administrative errors which Mr O has faced in the handling of his respective applications for IHER and a PIB, I find that on the whole, the correct remedial action has been taken by the parties in question and appropriate redress has been offered by the Adjudicator for the outstanding errors which have been identified.

83. I also find that the Regulations, in respect to ESA and IIDB, have been applied correctly by Cabinet Office and that these are deductible benefits pursuant to the 2019 Scheme amendment.

84. Mr O has said that the overall award offered in his case is "miniscule" given what he has paid for medical reports. Mr O's representative has made similar comments on proportionality of award, stating that an appropriate award for distress and inconvenience has not been offered. An award for either financial and/or non-financial injustice can only follow where there is a finding of maladministration. The higher amount I understand Mr O is seeking is not commensurate with the merits of his case as I do not agree that Mr O has suffered maladministration causing financial injustice. The awards recommended for Mr O's non-financial injustice are in accordance with my Office's guidance on non-financial injustice.

85. Mr O and his representative have further raised the matter of the ESA and IIDB benefits that he relinquished, which they say was upon the advice of MyCSP. They have highlighted that it would not have been logical for Mr O to make such a decision and this decision without doubt would have been because of the (incorrect) advice provided. MyCSP has been asked for its record of these conversations. Although it is regrettable that MyCSP has not been able to provide these recordings, I agree with

my Adjudicator in that there is insufficient evidence for me to find that Mr O was wrongly advised.

86. Mr O has also raised the point that MyCSP had underpaid him for over five years which would have contributed to his financial distress. This however is a matter which has arisen during the course of Mr O's complaint being with TPO and is a separate matter to the issues which were originally submitted and accepted for investigation. So, I have given no further consideration to this.

87. Mr O's representative has commented on SSCL's shortcomings as an outsourced HR provider. My role is to consider SSCL's conduct in the specific circumstances of Mr O's complaint. I do not agree that Mr O missed the opportunity to appeal the PIB decision in relation to his back injury solely because of SSCL's errors and I am satisfied with the conclusions reached on SSCL's actions in this case.

88. Finally, the actions of Health Assured do not fall within my remit for consideration.

89. I partly uphold Mr O's complaint. I find that Mr O would have suffered significant distress and inconvenience by MyCSP not providing him with a complete response on why his initial PIB assessment only included his PTSD, so I am increasing the award to £500.

Directions

90. Within 28 days of the date of this Determination, HMPPS shall:-

    (i) Pay Mr O the £250 award for distress and inconvenience and the £13 award for loss of interest that Cabinet Office directed on 27 November 2016.

    (ii) Pay Mr O £1,000 in recognition of the serious distress and inconvenience caused to him by SSCL misinforming him that he needed a SLE for his PIB application and for its oversight in excluding Mr O's back injury in its referral of his initial PIB application.

91. Also within 28 days of the date of this determination, MyCSP shall pay Mr O £500 for the significant distress and inconvenience he has suffered in not providing a satisfactory response concerning only considering PTSD in his initial PIB assessment.

Anthony Arter

Pensions Ombudsman
25.03.2022

Appendix 1

Advice from medical assessment on impairment of Earnings Capacity and Apportionment for Civil Service Injury Benefit, 12 December 2018

Dr Collins said:

> "There is a formal appeal procedure in respect of this recommendation. The decision to award or deny any injury benefit lies with the delegated authority. Appeals must be lodged within 12 months of the primary decision and must be supported by fresh medical evidence. A maximum of two appeals is allowed within the 12 months. Appeals must be submitted through the employer or delegated authority.
>
> …
>
> [Mr O]'s first formal appeal against advice provided by my colleague Dr Saravolac, in a report dated 05/03/2018, has been passed to me for consideration. My understanding from the referral is that [Mr O] wishes to appeal against Dr Saravolac's opinion both of the level of apportionment and impairment.
>
> I note that previous advice has been provided in relation to [Mr O]'s condition of back pain. Reports from Dr Gallagher, dated 15/10/2014, and Dr Saravolac, dated 05/03/2018, indicate a medical opinion that [Mr O]'s back pain be regarded as a qualifying injury for the purposes of the Civil Service Injury Benefit Scheme. I presume from the referral for advice regarding an appeal relating to a permanent award, that the delegated authority has accepted my colleagues' advice.
>
> I note that [Mr O]'s last day of service was 09/05/2016. I note his final salary was £29,219 per year.
>
> My understanding, from information provided by Dr Kneale in a report dated 10.08.2016, is that [Mr O] was deemed to have satisfied that PCSPS criteria for ill health retirement, with a lower tier award certificate issued dated 03/06/2016. I do not have access to either the ill health retirement report or certificate. My understanding, from Dr Kneale's report, is that ill health retirement was awarded on the basis of Post Traumatic Stress Disorder (PTSD).
>
> A person is eligible for a permanent award when they suffer a qualifying injury and the conditions of impairment of earnings capacity are met. Impairment of earnings capacity is assessed when the person is leaving employment. Since [Mr O] is no longer employed it is appropriate to conduct an assessment of the extent to which his earnings have been permanently impaired as a result of his qualifying injury. The assessment of earnings impairment relates only to the effects of the injury sustained through the causal incident. Since the injury was

sustained after 31 March 2003 I am also required to consider the issue of apportionment.

I will begin by considering the issue of apportionment.

The medical evidence indicates that [Mr O]'s first episode of back pain was in 2009, when he is said to have developed back pain whilst putting on his socks and for which he sought GP advice and treatment. The sickness absence record indicates a number of short term absences following this in 2012, 2013 and 2014, said to have resulted from events at work. The MRI of August 2015 indicates degenerative changes which Mr Hunt regards as pre-existing. Mr Hunt discusses these MRI changes in the context of the original presentation with pain in 2009. My understanding from the specialist evidence is that episodic short term absence is likely to have attributable to exacerbations of this degenerative disease. I note that Dr Saravolac supported the short absence in September 2014 as likely to be a qualifying injury on the basis of a short term condition. There is no likelihood that the degenerative change evident on the MRI scan would have developed in a short time scale and it is my expectation that it is for this reason that Mr Hunt refers back to the [sic] [Mr O]'s initial presentation with back pain in 2009. Noting these facts I do not believe I have grounds to revise the original opinion that [Mr O] injury be assessed as 50-70% attributable to duties.

I will now assess the extent to which [Mr O]'s earning potential has been permanently impaired as a result of his qualifying injury.

The starting point for assessing earning capacity is how it has been affected. There is a need to assess the applicant's capability, not whether or not he is employable in the labour market. In order to assess the degree of disablement the applicant's background skills, qualifications, and kind of employment that can be undertaken allowing for the particular effects of the qualifying injury are relevant. It is also relevant whether the person could manage that job full-time or would have to work part-time. It is not necessary for the person to have found work for an assessment to be made of earning capacity. It is also important to remember that earnings in any current job do not necessarily accurately reflect potential earnings, particularly if the present job is not commensurate with the person's experience, skills and educational qualifications.

My understanding is that [Mr O]'s ill health retirement was on the basis of mental ill health, as a result of PTSD. I note that the permanent effects of this have already been assessed by Dr Kneale in a report dated 10/08/2016. My understanding is that this appeal relates only to any permanent effects upon [Mr O]'s earning capacity arising from his previously recognised qualifying injuries with back pain.

In considering this, I note that, whilst [Mr O] has submitted evidence from an Osteopath to indicate that he remains symptomatic, the only treatment to which this evidence refers is of prescribed medication. The Osteopath refers to the findings of early degenerative change and gives an opinion that this would have been likely to be exacerbated by work activities. In addition the osteopath refers to twisting of the joint between the pelvis and spine associated with secondary muscle spasm. My understanding is that dysfunction of the sacro-iliac joint and any secondary effects would be amenable to treatment. The osteopath makes no comment upon the effects of future treatment. In the context of the mild changes noted on the MRI scan, Mr Hunt gave a clear statement regarding the benefit of further treatment such as pain management therapy / injection, indicating that further treatment would be of great benefit and might improve [Mr O]'s symptoms significantly or settle them completely.

More fundamentally, I note that Mr Hunt refers back to the initial presentation in 2009 indicating that, on the basis of the MRI evidence, the more recent symptoms appear to be an exacerbation of a pre-existing condition. The Osteopath's comments regarding degenerative change appear to support this. Whilst qualifying injuries have been recognised for previous short absences due to back pain, it is clear from the previous medical opinions that this was on the basis of a short term effect rather than a long term condition. This being the case, in my opinion the medical evidence does not indicate the current symptoms are likely to stem from the qualifying injuries previously recognised but rather from the pre-existing degenerative change. As such, any effect on the permanent earnings capacity cannot be attributed to the previously recognised qualifying injuries.

Having considered the information available, I would assess the extent to which [Mr O]'s earnings have been permanently reduced as a result of his qualifying injury as being less than 10%."

Appendix 2

Civil Service Injury Benefit Scheme Regulations (Section 1 of the Superannuation Act 1972)

Scale of Benefits – Rule 1.7

“Subject to rule 1.9a, the annual allowance under rule 1.6 will be the amount which when added to the benefits specified below, will provide an income of not less than the guaranteed minimum shown in the table below and appropriate to the circumstances of the case.

…

The benefits to be taken into account are:

(i) any occupational pension payable to him out of public funds or for which all or part of the contributions are so payable, except that

> (a) no account shall be taken of increases in pension resulting from an election made under rule 3.1a of the 1972 Section, or rule 5.8(b) of the Civil Service Compensation Scheme;
>
> (b) where a person has commuted an ill health pension under rule 3.4b of the 1972 Section or under rule D.9 of the 2002 Section, the pre commutation value of the ill health pension shall be used;
>
> (c) in the case of a member of the 2002 Section (other than a reserved joiner (as defined in the 2002 Section)), the value of a pension payable to him under the 2002 Section shall be deemed to be the amount which would be payable to him if he had exchanged such part of his pension as was necessary to give the maximum lump sum payable under rule D.8 of the 2002 Section;
>
> (d) in the case of a reserved joiner (as defined in the 2002 Section), he shall be deemed to have exchanged such part of his pension which was calculated using his new reckonable service (as defined in rule L.9(2) of the 2002 Section) as was necessary to give the maximum lump sum payable under rule D.8 of the 2002 Section in respect of that part of the pension;

(ii) any of the national insurance benefits specified in rule 1.8

(iii) which are payable to him; and (iii) where he has opted out of the 1972 Section, any personal pension or state earnings-related pension (as the case may be) to which he may be entitled.”

Rule 1.8

“…

(iii) the annuity value or the annual value, as appropriate, of any rights which have accrued or probably will accrue from the injury by way of—

(a) industrial disablement benefit;
(b) sickness benefit;
(c) invalidity pension;
(d) incapacity benefit;
(e) employment and support allowance; or
(f) any other benefit, or proportion thereof, paid from public funds,

except that no account will be taken of—

(a) any increase of the disablement pension payable under section 104 of the Social Security Contributions and Benefits Act 1992 (increase of a disablement pension where constant attendance is needed) or under section 105 of the Social Security Contributions and Benefits Act 1992 (increase of disablement pension in cases of exceptionally severe disablement); and

(b) so much of an unemployability supplement as represents an increase payable under paragraph 3 of Schedule 7 to the Social Security Contributions and Benefits Act 1992 (early onset of incapacity for work).”