CAS-59296-Q2J5

The Pensions Ombudsman

Ombudsman's Determination

Applicant:	Mr I
Scheme:	Civil Service Injury Benefit Scheme (**CSIBS**)
Respondents	Cabinet Office (Scheme Manager)
	MyCSP (Scheme Administrator)

Outcome

1. I do not uphold Mr I's complaint and no further action is required by MyCSP or the Cabinet Office.

Complaint summary

2. Mr I has complained that his application for an injury benefit has not been assessed in a proper manner.

Background information, including submissions from the parties

Background

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of correspondence between the parties.

4. The relevant provisions are contained in the Civil Service Injury Benefits Scheme Rules (the **Rules**). Rule 1(ii) states:

> "The benefits under this scheme will be paid at the discretion of the Minister and nothing in the scheme will extend or be construed to extend to give any person an absolute right to them."

5. Rule 1(iv) states:

> "Any question under this scheme shall be determined by the Minister, whose decision on it shall be final."

6. Under Rule 1(i), terms used in the Rules shall have the meaning given in the 1972 Section of the Principal Civil Service Pension Scheme (**PCSPS**). The Scheme Medical Adviser (**SMA**) is defined in the 1972 Section of the PCSPS Rules as:

   "the person or body appointed for the time being by the Minister to provide a consultation service on medical matters in relation to Civil Service pension and injury benefit arrangements …"

   The SMA at the time of Mr I's application for an injury benefit was Health Management Limited (**HML**).

7. Rule 1.3 provides:

   " … benefits in accordance with the provisions of this part may be paid to any person to whom the part applies and

   (i) who suffers an injury in the course of official duty, provided that such an injury is wholly or mainly attributable to the nature of the duty; or …

   (ii) who contracts a disease to which he is exposed wholly or mainly by the nature of his duty …"

8. Rule 1.6 provides:

   "Subject to the provisions of this part, any person to whom this part of this scheme applies whose earning capacity is impaired because of injury and:

   (i) whose service ends before the pension age … may be paid an annual allowance and lump sum according to the [SMA's] medical assessment of the impairment of his earning capacity, the length of his service, and his pensionable earnings when his service ends;

   …

   (iii) … who is receiving sick pay … for his injury, or whose entitlement to paid sick leave has expired and for whom the total amount of any sick pay …, together with any occupational pension … payable from public funds … and any of the national insurance benefits specified in rule 1.8(iii), amount to less that the amount of guaranteed minimum income provided for in rule 1.7 for total incapacity, may be paid a temporary allowance under this scheme of an amount sufficient to bring the said total up to the guaranteed minimum income for total incapacity …

   (iv) who has not retired but because of his injury is employed in a lower grade or in a different capacity with loss of earnings, may be paid an annual allowance in accordance with the [SMA's] medical assessment of the impairment of his earning capacity …"

9. Mr I was employed by the Department for Work and Pensions (**DWP**) until February 2020, when his employment was terminated on the grounds of "unacceptable

attendance". On 4 August 2020, DWP submitted an application for an injury benefit form to MyCSP on Mr I's behalf. DWP subsequently informed MyCSP that Mr I wished to withdraw this application and had asked that all details of the application be removed from MyCSP's systems.

10. On 29 August 2020, Mr I completed another application form. DWP sent this form to MyCSP on 7 September 2020. The injury benefit application form includes three consent forms: Form 1 gives consent for the person's occupational health records to be used; **Form 2** gives consent for the SMA to contact the person's GP and/or specialists; and Form 3 gives consent for the SMA to send their report to the person's employer. The notes to Form 2 explain that the SMA may wish to apply to the person's doctor or specialist for further medical information. The notes also explain that the person has the right to refuse consent and, if they choose to do so, they should proceed directly to Form 3.

11. MyCSP contacted DWP, on 21 September 2020, to inform it that Mr I's application form was incomplete; in particular, that Mr I had not signed Form 2. In response, DWP asked if the application could proceed without Mr I giving his consent to the SMA contacting his GP or specialist. In subsequent correspondence with MyCSP, Mr I said he understood that signing Form 2 was optional and he was of the view that sufficient evidence had been provided for the SMA to assess his application. MyCSP confirmed that completing Form 2 was optional and said:

    "However, please be advised that if the [SMA] is of the opinion that additional medical information is required to enable them to assess your application then it may impact on their ability to do this if they do not have consent to approach the relevant medical institute for this information."

12. DWP subsequently confirmed to MyCSP that Mr I wished to proceed with his injury benefit application without giving consent for the SMA to contact any medical professionals.

13. On 8 October 2020, MyCSP contacted the SMA explaining that Mr I did not wish to complete Form 2. MyCSP asked if Form 2 needed to be signed because it did not wish to waste the SMA's time by referring something to it which could not be actioned. It said, if a medical assessment could not be completed, it would make the decision without medical advice and likely reject Mr I's claim. MyCSP said Mr I was aware of this.

14. The SMA responded[1] by saying that, without the consent forms, it would be unable to request reports or send information back to MyCSP, so it would be unable to process the case. MyCSP informed DWP that, because Mr I's claim was related to his mental health, it was unable to assess his case without a medical assessment from the SMA and it had closed the case. DWP forwarded this information to Mr I and asked him

[1] The email to MyCSP, dated 28 October 2020, was signed by a customer service administrator.

how he wished to proceed. Mr I said he wished to make a complaint about the decision to close his case. He said:-

- He had given consent to access to his occupational health records and for the SMA to release its report to the DWP; subject to him seeing it first.
- He had exercised his right not to give consent to the SMA approaching his doctor or specialist because he felt that there was sufficient medical evidence available to make an assessment of his claim. MyCSP had not made completion of Form 2 a condition for processing a claim for injury benefit.
- Even if the SMA considered it could not assess his claim without consent to approach his doctor, he would have expected it to state this in an official assessment report. Not producing an assessment report had disadvantaged him because the decision to close his case was not appealable.
- It was peculiar that the SMA had concluded that it needed further medical information when MyCSP had not requested his occupational health records or presented these to the SMA.

15. MyCSP responded to Mr I's complaint:-

- Injury benefit applications were completed by individuals and their employers prior to being sent to MyCSP by the employer. The application process often required a medical assessment and individuals often needed to provide medical evidence from the time of the injury.
- In order for it to refer a person's details to the SMA, it required consent forms to be completed. Without completion of the relevant consent forms, the SMA could be prohibited from requesting reports or providing it with the information needed to implement an injury benefit award.
- It was not involved in the medical review and HML was not its medical representative. HML was the SMA appointed by the Scheme Manager, the Cabinet Office, to assess medical evidence for the purpose of the decision-making process.
- HML was independent from MyCSP and had its own agreements with the Cabinet Office concerning its role as SMA. MyCSP, as the Scheme administrator, was unable to comment on the SMA's medical assessment.
- It had advised DWP that Mr I's application was incomplete and DWP had confirmed that Mr I did not wish to complete Form 2. It had advised DWP that, if the SMA deemed it necessary to seek additional medical information to assist it in assessing his case and it did not have consent to do so, it might have an impact on its ability to assess his application.
- DWP had confirmed that Mr I wished to proceed with his application without the requested consent and it had advised the SMA of this. In its response, the SMA

had confirmed that it would be unable to request reports or send information to MyCSP without the completion of the consent forms.

- This meant that the SMA would be unable to provide MyCSP with a medical assessment. As it required a medical assessment from the SMA to proceed with Mr I's application, it had no recourse but to close his case. In order for it to be able to submit his application to the SMA, it would require completion of the consent forms as requested on the application forms.

16. Mr I submitted a complaint under the Scheme's two-stage internal dispute resolution procedure (**IDRP**). MyCSP issued a stage one decision on 29 October 2020. It said:-

- HML had been appointed as sole provider of medical advice for the Scheme. It was responsible for conducting a medical assessment based upon the application it received. This must include, but was not limited to, a completed application form, member consent forms, occupational health reports, sickness records and any further medical evidence.

- An employer was responsible for collating the relevant documents and referring the application to MyCSP.

- Mr I had not provided consent for HML to approach a doctor or specialist for further information about his medical condition. He had subsequently confirmed that he wished to proceed with his application without giving this consent.

- It had asked the SMA whether it would be able to complete a medical assessment without being able to approach any medical professionals. The SMA had confirmed that it would be unable to process Mr I's case.

- As a result, it was unable to progress Mr I's application or make a decision on his eligibility for a temporary injury benefit. Therefore, his application had been closed.

17. Mr I referred his complaint to the Cabinet Office under stage two of the IDRP. He said the main point at dispute was whether the SMA could refuse to produce a medical assessment report when the applicant had not given consent for it to approach their doctor or specialist, but had provided the other consents required. Mr I argued that the SMA could not refuse to produce an assessment report. He said, if the SMA deemed it necessary to obtain medical information from the applicant's doctors, it should produce a medical assessment report stating that further medical information was required.

18. The Cabinet Office issued an IDRP decision on 5 March 2021. It said:-

- It had spoken to the SMA. Whilst it was an individual's right to decide whether to give consent to approach their doctors, the SMA had confirmed that consent Form 2 was essential for it to make an assessment against the Scheme criteria and it could not process an application without it.

- The SMA was required to assess whether an injury had been sustained in the course of official duty and whether it was wholly or mainly attributable to the nature of the duty. It needed detailed information about absences, what happened at the time of the injury, and the applicant's medical history. For Mr I's condition, a GP/specialist's report was a prerequisite. The occupational health reports only looked at the impact of his injury on his ability to do his job.

- In some cases the SMA would have all that it needed to make an assessment without the consent to approach other treating medical practitioners. For example, an applicant may have included medical reports from such practitioners with their application. Mr I had not included such evidence.

- It agreed that Form 2 indicated that the applicant had a choice as to whether to complete it. It would raise the wording of the form with the relevant team to consider making the requirements clearer.

- MyCSP had explained that Mr I's decision not to sign Form 2 would affect the SMA's ability to assess his case. It did not agree that there had been any procedural irregularity in dealing with Mr I's application for an injury benefit.

19. On 30 June 2021, Mr I and the DWP signed a COT3 agreement to settle his claims in the Employment Tribunal and "all other Relevant Claims". The "Relevant Claims" included claims made in the Employment Tribunal against the DWP related to:

> "… the handling of the Claimant's Temporary Injury Benefit by the Respondent; the Claimant's subsequent grievance relating to the Temporary Injury Benefit; and occupational assessments carried out during his employment with the Respondent …"

20. The DWP agreed to pay Mr I £100,000.00.

Mr I's position

21. Mr I submits:-

- MyCSP should instruct the SMA to carry out an assessment of the medical aspects of his application and produce an assessment report.

- He has provided all of the necessary consents for a medical assessment. He has only withheld consent for the SMA to approach his GP because he considers that the SMA has sufficient medical information to assess the medical aspects of his application.

- The Cabinet Office has retrospectively changed the CSIBS Rules by claiming that a medical report from an applicant's treating physician is a prerequisite for the SMA to consider an injury benefit application involving mental health. This is not in line with the description of the process contained in the injury benefit application form, which was accepted in the stage two IDRP response. In any event, he did

provide his occupational health reports and several medical certificates from his GP.

- His application should not have been rejected without having been referred to a medically qualified person. Only a medically qualified professional can determine what is required to form an opinion in his case.

- At no point did a qualified professional with the SMA's office determine whether it had sufficient information on his application. His application was not reviewed by the SMA nor were the supporting medical documents.

- His COT3 document supports an argument that his employer tacitly acknowledged the existence of a work-related injury which caused psychiatric damage.

Cabinet Office's position

22. The Cabinet Office has referred to the decisions made under the IDRP. It submits:-

- In order to be considered for an injury benefit, the member must have sustained the injury during the course of official duty and the injury has to be wholly or mainly attributable to the nature of the duty. If both of these conditions are satisfied, the injury is deemed to be a qualifying injury. In order to properly assess these conditions, the SMA needs to know information about the member's absences from work, what happened at the time of the injury and also the member's medical history.

- Without a GP or specialist report, the SMA is unable to fully assess whether the injury is a qualifying injury. An occupational health report does not contain the necessary detail. It may not cover the member's full medical history. This is necessary in order to see whether the member has suffered a similar injury previously. This would be relevant when the SMA is considering whether the injury is wholly or mainly attributable to the nature of the duty.

Adjudicator's Opinion

23. Mr I's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Cabinet Office or MyCSP. The Adjudicator's findings are summarised below:-

    23.1 In order to qualify for an injury benefit under Rule 1.3, Mr I had to have:-

    - suffered an injury in the course of official duty, which was wholly or mainly attributable to the nature of the duty; or

    - contracted a disease to which he had been exposed wholly or mainly by the nature of his duty.

23.2 The decision as to whether Mr I satisfied the criteria under Rule 1.3 was made by MyCSP (on behalf of the Minister) initially and the Cabinet Office on appeal.

23.3 Rule 1.3 did not specifically require MyCSP and/or the Cabinet Office to refer an injury benefit application to the SMA in order to decide whether the applicant satisfied the criteria set out in that rule. Whereas, the SMA's assessment of the impairment of the applicant's earning capacity was specifically called for under Rule 1.6. However, a decision had to be made as to whether the applicant satisfied the criteria under Rule 1.3 before the case could proceed to consideration under Rule 1.6.

23.4 The Adjudicator said that, in her view, regardless of whether Rule 1.3 required a referral to the SMA at that stage in the process, it would be considered good practice for MyCSP to seek advice from the SMA as to whether the applicant satisfied the criteria under that rule.

23.5 In Mr I's case, MyCSP had asked the SMA whether it would be able to provide the advice needed in the absence of his consent for it to approach his treating physicians. It had been advised that this was not considered possible.

23.6 The decision by the SMA to decline to give advice in the absence of Mr I's signed Form 2 did not come within the Pensions Ombudsman's jurisdiction. It was a matter for the SMA's professional judgment; for which it would be accountable to the appropriate professional bodies and/or the General Medical Council.

23.7 The question for the Pensions Ombudsman was whether there had been any maladministration on the part of MyCSP and the Cabinet Office and, if so, whether Mr I had sustained any injustice as a consequence.

23.8 Having been advised by the SMA that it did not consider it would be able to assess Mr I's case without a signed Form 2, MyCSP had closed the case. Strictly speaking, it should have proceeded to make a decision, under Rule 1.3, on the basis of the evidence it did have. The evidence available to MyCSP consisted of Mr I's application, his occupational health records and some medical certificates completed by his GP. As an alternative to closing the case, it would have been open to MyCSP to decline Mr I's application on the basis that it had insufficient medical evidence to conclude that he satisfied the criteria under Rule 1.3.

23.9 The Adjudicator said she had given some thought to whether MyCSP's action in closing Mr I's case could be said to amount to maladministration. On the basis that it did not fulfil the requirement to make a decision under Rule 1.3, closing Mr I's case did amount to maladministration. However, in the Adjudicator's view, Mr I had not sustained any injustice as a

consequence and the Pensions Ombudsman would be very unlikely to uphold his complaint.

23.10 The Adjudicator explained that this was because, effectively, Mr I was in the same position as he would have been in if MyCSP had declined his application. Mr I had argued that he had been disadvantaged by the SMA's decision not to advise on his case. The Adjudicator reiterated that the SMA's decision was not within the scope of the investigation. Given that Mr I had been free to pursue his case through the IDRP and on to the Pensions Ombudsman, it was her view that the action by MyCSP, in closing his case at the point it did, had not disadvantaged him.

23.11 It had been made clear to Mr I, by both MyCSP and the Cabinet Office, that his decision not to sign Form 2 would impact on the SMA's role in his case. The Adjudicator noted that it had remained open to Mr I to sign Form 2 at any time in the process and have his case referred to the SMA. The Adjudicator agreed with Mr I that it was his choice as to whether he signed Form 2, but he would have to accept the consequences of his decision.

23.12 Mr I had argued that his application should not have been rejected without having been referred to a medically qualified person because only a medically qualified professional could determine what was required to form an opinion in his case. However, the Adjudicator noted that he had also argued that the SMA had sufficient medical information to assess the medical aspects of his application. She expressed the view that these two arguments were incompatible with each other.

23.13 MyCSP had attempted to refer Mr I's application to a medically qualified person. That part of the process had been stymied by Mr I's decision not to sign Form 2.

24. Mr I did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr I provided further comments which are summarised below. I have considered Mr I's comments but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Mr I's further comments

25. Mr I says losing the opportunity to have a decision made either way on his injury benefit application is a clear and significant injustice. He argues that the test applied to determine whether he sustained injustice, as a consequence of the maladministration identified, presupposed that his application for injury benefit would have been declined. He suggests that it could easily have been approved because the DWP had tacitly acknowledged the existence of a psychiatric injury at work.

26. Mr I says the time and trouble taken for him to pursue this issue is another significant injustice which would not have occurred but for the maladministration identified. He says he began pursuing his complaint from October 2000 (sic).

27. Mr I disagrees that his arguments, referenced in paragraph 23.12 above, are inconsistent with each other. He says his primary position is that there was sufficient medical information for his injury benefit application to be determined. He suggests that his alternative argument is that, if that was not the case, the medical information sufficiency issue could only have been determined by a qualified medical professional; that is, not by MyCSP or the Cabinet Office or a customer service agent at the SMA's office.

Ombudsman's decision

28. In order to qualify for an injury benefit, Mr I had to satisfy the conditions set out in Rule 1.3 (see paragraph 7 above). The decision as to whether Mr I did satisfy these conditions was to be made by MyCSP; acting on behalf of the Minister.

29. As a first step in the decision-making process, MyCSP approached the SMA for advice on whether Mr I did satisfy the Rule 1.3 conditions. This was entirely appropriate in the circumstances. Rule 1.3 calls for a decision to be made on whether Mr I has suffered an injury which was wholly or mainly attributable to the nature of his duty (or contracted a disease to which he had been exposed wholly or mainly by the nature of his duty). It is understandable that MyCSP would seek medical advice before making such a decision. HML had been appointed as SMA, which is defined as:

> "the … body appointed for the time being by the Minister to provide a consultation service on medical matters in relation to … injury benefit arrangements"

30. The problem arose when the SMA informed MyCSP that it would not be able to provide advice in Mr I's case because he had declined to give it consent to approach his treating physicians. This is a decision which the SMA was entitled to make.

31. Mr I has argued that the question of whether the medical evidence which could have been made available to the SMA was sufficient could only be determined by a qualified medical professional. He has referred to the decision being made by a customer service agent at the SMA's office. I take this to be a reference to the fact that the email responding to MyCSP's enquiry came from a customer service administrator. This is not actually evidence of who at the SMA made the decision; it is merely evidence of who conveyed the decision to MyCSP. In any event, the decision-making process by the SMA is outwith my jurisdiction.

32. I note Mr I's explanation for the apparent contradiction in him arguing that there was sufficient evidence for the SMA to assess his case while, at the same time, saying that this could only be determined by a medical professional. Mr I is not, as far as I am aware, a medical professional and therefore, by his own argument, could not assess the sufficiency of the available medical evidence.

33. That being said, my concern is with the action taken by MyCSP after it had been informed that the SMA declined to provide it with advice in Mr I's case. MyCSP closed Mr I's case.

34. I agree with my Adjudicator that Rule 1.3 called upon MyCSP to make a decision regardless of the fact that it had been unable to obtain advice from the SMA. I note, however, that Mr I's case would have been unlikely to progress beyond a Rule 1.3 decision by MyCSP because Rule 1.6 requires an assessment of impairment of earning capacity by the SMA. In the circumstances, it seems likely that the SMA would have asked for consent to approach Mr I's treating physicians at that point.

35. I take the view that, on the balance of probabilities, MyCSP would have decided that there was insufficient evidence for it to find that Mr I satisfied the Rule 1.3 conditions. He would then have had the same opportunity to appeal such a decision as he went on to avail himself of; namely, the two-stage IDRP and an application to me.

36. I note Mr I's argument that, had MyCSP not closed his case, there was a possibility that his application would have been approved because, in his view, the DWP had tacitly acknowledged the existence of a psychiatric injury at work. Mr I is referring to the COT3 settlement agreement between himself and the DWP. The COT3 agreement contains no specific reference to a psychiatric injury at work; it merely records the agreement reached to settle Mr I's claims in the Employment Tribunal, including any claim for unspecified personal injury. This was signed in June 2021 and, therefore, post-dates the closing of his injury benefit application by MyCSP. In any event, Rule 1.3 calls upon MyCSP to make an independent decision as to whether Mr I satisfies the conditions for an injury benefit.

37. In summary, I find that it was maladministration on the part of MyCSP to close Mr I's case without making a decision under Rule 1.3. However, I find that Mr I did not sustain any injustice as a consequence because he is in the same position as he would have been in if MyCSP had decided that there was insufficient evidence to say he satisfied the Rule 1.3 conditions; which, in my view, is the most likely outcome had his case proceeded to a Rule 1.3 decision.

38. I do not uphold Mr I's complaint.

Anthony Arter
Pensions Ombudsman

16 August 2022