CAS-76344-C9F5

Ombudsman's Determination

Applicant	Mr W
Scheme	Civil Service Injury Benefit Scheme (**the Scheme**)
Respondents	MyCSP
	Cabinet Office

Outcome

1. Mr W's complaint against MyCSP and Cabinet Office is partly upheld. To put matters right, Cabinet Office shall pay Mr W £500 for significant distress and inconvenience.

Complaint summary

2. Mr W says his Permanent Injury Benefit (**PIB**) appeal has not been properly considered in accordance with the applicable Civil Service Pensions Medical Appeals and Review Guide (**the MRAG**).

3. Mr W also says that MyCSP and Cabinet Office decisions at Stage One and Stage Two of the Internal Dispute Resolution Procedure (**IDRP**) were delayed causing him distress and inconvenience.

Background information, including submissions from the parties

Background

4. Extracts from the applicable MRAG (dated September 2017) are provided in the Appendix.

5. The relevant rules are the Civil Service Injury Benefits Scheme Rules (as amended). As relevant, 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 Scheme Medical Adviser's**

> **medical assessment** [emphasis added] of the impairment of his earning capacity, the length of his service, and his pensionable earnings when his service ends; …"

6. Mr W was employed by the Department for Work and Pensions (**DWP**). He injured his back in November 2013 and took sick leave. He did not return to work before his employment ended in May 2014.

7. Before leaving the DWP, Mr W applied for a PIB. In October 2014, MyCSP, the Scheme's Administrator, wrote to Mr W with its decision that his injury did not qualify for a PIB, based on advice from the then Scheme Medical Adviser (**SMA)**. Mr W unsuccessfully appealed under the MRAG, and in May 2016 he initiated the Scheme's two-stage IDRP. While the Stage One appeal was unsuccessful, Cabinet Office, the Scheme Manager, upheld Mr W's Stage Two appeal in January 2017, concluding that MyCSP should refer Mr W's case back to the SMA for further advice. The SMA subsequently advised that Mr W had sustained a soft tissue injury in November 2013 that was unlikely to have had any permanent adverse effect on his earning capacity. MyCSP accepted the SMA's advice, and no injury benefit award was made. Mr W's Stage One appeal was unsuccessful in September 2017. Mr W's Stage Two appeal included a GP's report dated 21 November 2017. Once again, the Cabinet Office decided to refer the case back to MyCSP to contact the SMA for further advice taking into account the GP's report.

8. In July 2018, Dr Kneale, a medical adviser (**MA**) for the current SMA, Health Management Limited (**HML**), advised that the estimate of the degree to which Mr W's general earning capacity had been impaired only by the effects of the injuries sustained through the causal incident was 10% - 25%, slight impairment; and the estimate of the degree to which the illness had been caused by the effects of the injuries sustained through the causal incident was 50% - 70% attributable, low band. MyCSP accepted the SMA's advice.

9. In September 2018, Cabinet Office contacted Mr W to confirm that MyCSP was bringing together the processing of his Retrospective Ill Health Retirement (**RIHR**) and PIB awards and asked if this resolved his appeal. Mr W said it did not. Mr W said he disagreed with the SMA's assessment of the effect that his qualifying injury had on his earnings capacity as this was at odds with the medical board findings for his RIHR application and his GP's report of 21 November 2017. Mr W also complained about the length of time taken to complete the IDRP process.

10. On 5 November 2018, the Cabinet Office wrote to Mr W to confirm its Stage Two decision, not upholding his appeal.

11. In December 2018, Mr W complained to The Pensions Ombudsman that he should have been awarded the highest level of PIB and that MyCSP and the Cabinet Office had taken too long to consider his IDRP appeal[1].

12. In September 2019, Mr W appealed Dr Kneale's assessment of the impairment of his earning capacity. Dr Collins (an MA for the SMA) issued a report in February 2020 agreeing with Dr Kneale's advice. In March 2020, MyCSP informed Mr W that he had exhausted the appeal process.

13. In May 2020, Mr W again invoked the Scheme's IDRP. Mr W said:-

- Neither Dr Kneale nor Dr Collins were senior physicians as required by section 9.2.1 of the MRAG.

- Following a subject access request, HML had informed him that it did not employ any senior medical physicians. So, it was impossible for the SMA to correctly comply with the MRAG regarding injury benefit appeals and reviews.

- The MRAG provided for the referral of borderline cases to a physician independent of the SMA for a further paper-based assessment either by the chief medical adviser or the deputy chief medical adviser to the contract. The independent physician may uphold or reject the case at this final stage, remitting it back to the authorising authority/employer for a final decision. It had been stated on several occasions by the SMA, MyCSP and Cabinet Office that his case was complex, and the outcome had in fact been borderline. Furthermore, the SMA's physicians and occupational health consultants had all, at various stages over the last six years, been involved in his RIHR application and appeals and his PIB application and appeals. All had worked for all three SMA's - Capita Health and Wellbeing, Health Assured and now HML. This repeated involvement had prejudiced his appeal and prevented any chance of a fair, unbiased and impartial decision. He therefore required that his fresh appeal be referred to a physician independent of the SMA.

- He rescinded his permission and authority for any medical evidence that he had submitted from Dr Okereke, Dr Saab and Mr Braithwaite to be used in determining any medical assessment on impairment of his earnings capacity and apportionment regarding his injury benefit appeal. He wanted only his GP's report of 13 September 2019 to be considered.

- Similarly, in the event of a second appeal, he wanted a senior physician independent of the SMA to consider his appeal only using his GP's report of 13 September 2019.

- He wanted the label of "soft tissue injury" to be removed from any referral by the SMA to a physician independent of the SMA, as he believed it was deliberately

[1] In July 2020, the then Pensions Ombudsman did not uphold Mr W's complaint (Determination *PO-28030*)

misleading and prejudiced any chance of a fair appeal or assessment. The exact nature of the qualifying injury sustained at work in November 2013 had never been conclusively proven or established by any SMA. The correct description was spinal injury.

14. In early June 2020, MyCSP acknowledged receipt of Mr W's Stage One appeal and informed Mr W that its decision might take up to two months to complete and if it was unable to make its decision within this timeframe it would contact him with reasons.

15. In October 2020, Mr W chased MyCSP for its decision. MyCSP apologised for the time taken and for not keeping him informed and explained that it had been waiting for information to address his concerns.

16. On 29 October 2020, MyCSP issued its Stage One decision turning down Mr W's appeal. MyCSP said:-

- The content of Mr W's most recent dispute focused solely on the SMA's handling of his appeal, and its interpretation of the nature of his injury in line with the rules of the Scheme.

- The current SMA, HML, did not hold records from the previous SMA. HML became sole provider for medical advice for the Scheme from 1 July 2018. Prior to this, the SMA was Health Assured and during the transition of provider, unless a case was active, that is, the medical assessment was in progress, the case files for applicants were destroyed by the previous SMA for data protection purposes.

- Dr Evans provided the original advice on 20 February 2017, that Mr W's condition of a soft tissue back injury should be regarded as a qualifying injury for the purposes of the Scheme. Dr Kneale provided advice from a medical assessment on impairment of earnings capacity and apportionment for an Injury Benefit, dated 17 July 2018 as the initial consideration of Mr W's application. Dr Collins then considered Mr W's first formal appeal in her report of 19 February 2020.

- Mr W believed Dr Kneale and Dr Collins were not senior physicians as required under section 9.2.1 of the MRAG. While the term senior physician was not defined in the MRAG, it was taken to mean a consultant (accredited specialist) in occupational medicine who held the qualification Membership of the Faculty of Occupational Medicine (**MFOM**) and had appropriate training and experience in Civil Service Pensions. The SMA had confirmed that both Dr Kneale and Dr Collins met those criteria and so were considered to be senior physicians.

- The SMA had explained that 'senior physician' was not a title generally used within HML. With only one exception, all the occupational physicians currently working on the Civil Service Pensions contract were consultants and held at least MFOM. So, they would all be considered to be senior physicians. They had also been approved as signatories for the purposes of the Scheme by Cabinet Office.

- As stated within the MRAG, the senior physician who considered the first appeal should be different from the one who made the original decision. From the information available, this occurred for Mr W's application. Any second appeal was considered by a physician different from either the one who gave the original advice and/or considered the first appeal.

- Procedurally, there was no requirement to offer a consultation as part of any injury benefit assessment. If the SMA considered a consultation was necessary, it may be arranged. However, the SMA had noted that in Mr W's case this was not necessary, as was often the case, as any relevant information could be obtained from Mr W's RIHR application and appeal.

- HML, as SMA, was contracted to Cabinet Office to provide impartial medical advice, considering all the relevant medical evidence and information available. So, while Mr W was entitled to withdraw the consent he had previously given for any information to be used for the purpose of future assessments, this would mean that the SMA was unable to carry out any future appeal, unless specifically instructed to do so by Cabinet Office.

- The option within the MRAG for referring a borderline case to a physician independent of the SMA for a further paper-based assessment would only be made by either the Chief Medical Adviser or Deputy Chief Medical Adviser to the contract. This could only be carried out on the basis of all the relevant medical evidence being considered, not just one specific report. Any variation to the process would need to be approved by Cabinet Office as Scheme Manager.

- The referrals which the SMA received from Civil Service Pensions stated the nature of Mr W's injury to be a soft tissue back injury. This was consistent with Dr Evans' medical assessment on Mr W's eligibility for an Injury Benefit of 20 February 2017. As the delegated authority (Civil Service Pensions) had accepted Dr Evans' advice that Mr W's condition of soft tissue back injury be regarded as a qualifying injury for the purposes of the Scheme, it was not possible to change the nature of the qualifying injury to spinal injury.

17. On 22 November 2020, Mr W appealed the Stage One decision. Mr W said, MyCSP had taken five months to issue its Stage One decision. This was three months outside its two-month stated timescale. It had also failed to keep him informed. Referring to the MRAG dated July 2012, Mr W said:-

    - His PIB claim had at times been referred to as "complex" and "borderline". He wanted a full explanation why his case had not been referred to an independent physician or why he had not been referred for a physical examination.

    - He disagreed with the explanation of 'senior physician'. He did not think that there were any suitably qualified MAs employed by HML to satisfy the MRAG process.

    - Whether or not 'senior physician' was defined in the MRAG, by way of seniority they should differ from other physicians employed by the SMA. The dictionary

definition of 'senior' was "higher in rank or status than others". Therefore, by definition, the physicians employed at HML could not all be "higher in rank or status than others" if they were all equal (as claimed) and all with the same qualification. So, by definition, the physicians employed at HML could not all be senior.

- His appeal against the impairment of his earning capacity and apportionment should be correctly assessed in line with the MRAG (by a senior physician and referred to a "physician independent of the medical adviser for a further paper-based assessment"). In the event of a second appeal, he wanted the same conditions to be met.

- He gave permission for all the medical evidence to be used.

18. Cabinet Office received Mr W's appeal on 1 December 2020.

19. On 31 July 2021, Cabinet Office issued its Stage Two decision. The appointed person for Cabinet Office apologised for the time taken to issue the decision and said:-

    - She had reviewed Mr W's appeal, the information the SMA had given and the relevant guidance and was satisfied that the correct process had been followed.

    - The SMA's physicians were medically qualified, and, in their view, a physical examination had not been necessary because the evidence Mr W gave supporting his applications was sufficient to allow them to make a decision. Similarly, neither the chief medical adviser nor the deputy chief medical adviser deemed it necessary to refer Mr W's case to an independent physician.

    - The initial review and appeal were conducted by different physicians. The MRAG did not define 'senior physician'. This, essentially, was a historic reference, which should have been removed when the MRAG was updated. There was no question that Mr W's application and appeal had been assessed by suitably qualified physicians and in accordance with the MRAG.

    - The correct processes had been followed and the SMA's decision was not perverse.

    - In respect of Mr W's request for a second appeal, he was out of time. Under the Scheme Rules, members may make two appeals within 12 months of the original decision. In Mr W's case, the original decision was issued in July 2018. MyCSP confirmed that, due to a previous Stage Two appeal in November 2018, Mr W had until November 2019 to submit both of his appeals. Mr W submitted his first appeal in September 2019. There was some delay by Mr W's employer completing its part of the form (which was addressed in the third Stage Two decision of 8 July 2020[2]) and his appeal was sent to the SMA in January 2020.

[2] Mr W complained to TPO about this matter. His complaint was not upheld by the Pensions Ombudsman in March 2024 (Determination *CAS-57124-Q7D6*).

The SMA completed the first appeal decision in February 2020. In March 2020, MyCSP confirmed that Mr W had exhausted the appeal process. There was no reason to allow an extension under the circumstances.

- In respect of the delays with the Stage One decision, MyCSP had been waiting for information to fully address Mr W's concerns. MyCSP could have kept Mr W updated during this process. In the circumstances, MyCSP's apology within its Stage One decision letter[3] was appropriate redress and no further action was needed.

Mr W's position

20. Mr W submits:-

- His PIB has not been properly considered in accordance with the MRAG applicable at the time.
- He is not receiving the PIB he is entitled to.
- MyCSP and Cabinet Office have failed to adhere to the timescales laid-out in the IDRP and have frustrated the process.
- He wants his case to be referred to a physician independent of the SMA for a further paper-based assessment, as prescribed in the MRAG applicable at the time.
- He wants compensation regarding the maladministration of his PIB application.

MyCSP's and Cabinet Office's position

21. MyCSP's position is as per its Stage One decision of 29 October 2020. Cabinet Office's position is as per its Stage Two decision of 30 July 2021.

Adjudicator's Opinion

22. Mr W's complaint was considered by one of our Adjudicators who concluded that further action was required by Cabinet Office. The Adjudicator's findings are set out below in paragraphs 23 to 37.

23. Firstly, the Adjudicator said that he was unable to consider matters that had been previously determined by the Ombudsman. In December 2018, Mr W complained to TPO that he disagreed with the level of his PIB award. His complaint was not upheld

[3] The Stage One decision did not include an apology. The appointed person seems to have mixed this with MyCSP's email to Mr W earlier in the month (see paragraph 18 above).

by the then Pensions Ombudsman. Referring to Dr Kneale's July 2018 report, the Ombudsman found no "failure or injustice in the procedure carried out by the SMA".

24. Mr W said the process, in accordance with MRAG, was not followed in the consideration of his PIB appeals.

25. Mr W contended that neither Dr Kneale nor Dr Collins were senior physicians.

26. 'Senior physician' was not defined in the applicable MRAG (dated September 2017 – the Adjudicator noted that in his Stage Two appeal Mr W had quoted from the previous version dated July 2012) and it was not a term used in the Scheme Rules. Rule 1.6 simply referred to "the Scheme Medical Adviser's assessment".

27. It had been confirmed that both Dr Kneale and Dr Collins were MFOM qualified and were trained and experienced in Civil Service Pensions. They had also been approved as signatories for the purposes of the Scheme by Cabinet Office. As such they were accredited specialists in occupational health and considered to be senior physicians. The Adjudicator's view was that this was not unreasonable.

28. Mr W said he wanted his case to be referred to a physician independent of the SMA for a further paper-based assessment, as prescribed in the MRAG applicable at the time.

29. The MRAG stated that the SMA had the option to refer a borderline case to a physician independent of the SMA for a further paper-based assessment. But such a referral would only be made by either the chief medical adviser or the deputy chief medical adviser to the contract. Cabinet Office had confirmed, in its Stage Two decision, that the SMA did not deem it necessary to refer Mr W's case to an independent physician; and evidently, Dr Kneale and Dr Collins considered that they had sufficient medical evidence to give their respective opinions without examining Mr W. That was within their remit to decide.

30. The MRAG required that the senior physician who considered the first appeal should be different from the one who made the original decision. This occurred in Mr W's case.

31. The Adjudicator found no reason to say that the consideration of Mr W's appeal of Dr Kneale's advice had not adhered to the MRAG.

32. The Adjudicator then turned to the time taken respectively by MyCSP to issue its Stage One decision and Cabinet Office to issue its Stage Two decision.

33. The overriding legislation in respect of IDRP was set out at section 50 of the Pensions Act 1995, and up to 27 March 2024 the details were set out in the Pension Regulator's (**TPR's**) Code of Practice 11. The same requirements were included in TPR's new general code, effective 28 March 2024. This stated that TPR expected that a decision on a dispute would be made within four months of receiving the application, the same periods applied to each stage if a two-stage IDRP was in place.

34. MyCSP notified Mr W that its Stage One decision might take up to two months to complete and if it was unable to make its decision within this timeframe it would contact him with reasons. Clearly, MyCSP failed to adhere to its policy. Nonetheless, albeit belatedly, it did explain to Mr W why its decision was delayed and apologised.

35. While the delay would have caused Mr W distress and inconvenience, in the circumstances the Adjudicator did not consider it quite met the threshold for a distress and inconvenience payment in line with the Pensions Ombudsman's current guidance[4].

36. Cabinet Office received Mr W's Stage Two appeal on 1 December 2020. It issued its Stage Two decision on 31 July 2021, eight months later. While Cabinet Office apologised for the delay, the Adjudicator said that he had seen no evidence that Cabinet Office kept Mr W informed over the interim period or explained the reasons for the delay. Additionally, Cabinet Office was aware that MyCSP's Stage One decision had been delayed. In the circumstances, the Adjudicator's view was that a payment of £500 for significant distress and inconvenience was merited.

37. So, the Adjudicator's opinion was that Mr W's complaint should be upheld in part.

38. Mr W did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr W has provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr W.

Mr W's further comments

39. Mr W submits:-

- Since his initial application for an injury benefit in May 2014, the SMA has changed its name on several occasions. Initially it was called Capita Health and Wellbeing, then Health Assured and then HML. The same MAs have remained in situ, working for the SMA, and were involved in both his injury benefit and RIHR applications. This has prevented impartial appeals and reviews from being properly considered.

- The SMA has a proven track record of submitting false information by at least one of its MAs, Dr Raynal. In her August 2014 report, Dr Raynal falsely stated that his GP had not been forthcoming with a requested report despite several reminders. The Practice had since informed him that it received one request for a medical report and after it wrote to the SMA (then Capita Health and Wellbeing) that the provision of the report would cost £65 it heard nothing more. If he had been notified at the time that the SMA was not prepared to pay the fee for the report, he would have willingly paid it. Dr Raynal also said that the SMA did not have his consent to approach another doctor for a report. This was intentionally misleading as the SMA had never asked for his consent. He complained to Health Assured about the conduct of Dr Raynal in early April 2016. Unsurprisingly he bever heard

[4] https://www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Updated-Non-financial-injustice-September-2018-2_0.pdf

back from the SMA. Dr Raynal was subsequently involved in his injury benefit appeal in May 2018, which was a procedural irregularity, quite improper and contrary to the rules of natural justice.

- It is his contention that the decision not to award him a PIB at the highest rate was not reached in a proper manner. Specifically, this is regarding:-
    - The aforementioned: misconduct of Dr Raynal, her failure to obtain medical evidence and her subsequent improper involvement in his injury benefit appeal.
    - The SMA's failure to:-
        - Properly obtain medical evidence in 2014 and properly consider his GP's report of 13 September 2019.
        - Refer his borderline case to a physician independent of the SMA for a further paper-based assessment as prescribed by the MRAG applicable at the time.
        - Follow part 9.2.1. of the MRAG, by not appointing a senior physician to consider his first appeal who had not made the original decision.
        - Properly and impartially consider his injury benefit reviews and appeals by involving the same MAs at different stages.
- No "senior physicians" were employed by the SMA at the time his PIB appeal was considered. So, the SMA was quite simply not able to properly consider his appeal in accordance with the rules as stipulated in the MRAG.

Ombudsman's decision

40. I have set aside Mr W's comments about the SMA and Dr Raynal pertaining to his original PIB application in 2014 and appeal in 2018 as, in December 2018, the then Pensions Ombudsman determined (*PO-28308*) that Mr W's application for a PIB had been properly considered. So, I cannot revisit the matter.

41. I have also set aside Mr W's comment that his GP's report of 13 September 2019 was not properly considered, as this is not part of the complaint that my office accepted for investigation.

42. I agree with the Adjudicator, for the reasons set out in paragraphs 26 and 27 above, that it is reasonable to consider Dr Kneale and Dr Collins as senior physicians.

43. As the Adjudicator explained, the MRAG states that the SMA has the option to refer a borderline case to a physician independent of the SMA for a further paper-based assessment. Cabinet Office has confirmed that the SMA did not deem it necessary to refer Mr W's case to an independent physician. I have no reason to say that the SMA's decision was not properly made.

44. The MRAG requires that the senior physician who considered the first appeal should be different from the one who made the original decision. Clearly that occurred in this case. The July 2018 opinion was provided Dr Kneale, and the first appeal was considered by Dr Collins.

45. I agree with the Adjudicator (for the reasons given in paragraphs 33 to 35 above) that the time MyCSP took to issue its Stage One decision does not quite merit a payment for significant distress and inconvenience. I also agree with the Adjudicator (for the reasons given in paragraph 36 above) that Cabinet Office's delay in issuing its Stage Two decision merits a payment of £500.

46. I uphold Mr W's complaint in part.

Directions

47. Within 28 days of the date of this Determination, Cabinet Office shall pay Mr W £500 for significant distress and inconvenience.

Dominic Harris

Pensions Ombudsman

26 April 2024

Appendix

Extracts from the 'Medical Reviews and Appeals Guide: Civil Service Pension Scheme and Civil Service Injury Benefit Scheme' – applicable Sept 2017 to May 2020.

1. "**Injury benefit formal appeals**

   …

   9 Process

   The formal Injury Benefit Appeal procedure has only 1 stage but 2 separate appeals can be made within the appropriate period (12 months of the initial award decision).

   Any appeal should be made within 12 months of the initial Award decision. The second appeal may be notified up to and including the day the 12 month period ends – under these circumstances the appeal process may go beyond 12 months in its entire duration.

   …

   Action by the Scheme Medical Adviser

   9.1.7 Whether considering a first or second appeal there are three different options open to the Scheme Medical Adviser:

   • Uphold the appeal returning the case to MyCSP or the employer for a final decision.

   • Reject the appeal (it goes no further) remitting the case back to the Authorising Authority/employer for a final decision.

   • Referring a border-line case to a physician independent of the medical adviser for a further paper-based assessment. Such a referral would only be made by either the chief medical adviser or deputy chief medical adviser to the contract. The independent physician may uphold or reject the case at this final stage, remitting it back to the authorising Authority/employer for a final decision.

   9.2 A first appeal

   9.2.1 A senior physician will consider the appeal in the light of the new medical evidence provided by the member. The senior physician who considers the first appeal will be different from the one who made the original decision.

   9.2.2 The appeal is normally considered on the basis of the information submitted. However, a consultation may be required if the physician considers it necessary.

9.2.3 The first appeal may uphold the original decision or result in an increase to the level of award.

9.3 A second appeal

9.3.1 Any second appeal is considered by a Scheme Medical Adviser physician different from either the one who gave the original advice and/or who considered the first appeal – in most cases the physician considering the second appeal will be a senior physician.

9.3.2 Any second appeal may do as the first appeal but can, in addition, lower the level of apportionment and/or earnings impairment if the new medical evidence justifies it.

9.3.3 This completes the formal Injury Benefit Appeal arrangement. If a member has any concerns about the way the process has operated in their case, they should refer to the Independent Disputes Resolution (IDR) Procedure. Information about the IDR procedures can be found on the website: www.civilservice.gov.uk/pensions/ under helplines."

2. Senior physician is not defined in the MRAG.