PO-27414

Ombudsman's Determination

Applicant	Mr R
Scheme	Civil Service Injury Benefit Scheme (**CSIBS**)
Respondents	MyCSP The Cabinet Office

Outcome

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

Complaint summary

2. Mr R has complained that his permanent injury benefit (**PIB**) has not been calculated correctly and he should be awarded the highest level of benefit. He also believes that the Scheme Medical Adviser (**SMA**) should have considered medical evidence that was available at the time he left employment in 2013 and not more recent evidence at the time he applied for PIB in 2016.

Background information, including submissions from the parties

3. The relevant rules are the Civil Service Injury Benefits Scheme Rules (as amended) (**the Rules**). These were made, on 22 July 2002, under section 1 of the Superannuation Act 1972, and came into force on 1 October 2002. Rule 1(ii) provides that benefits are paid at the discretion of the Minister.

4. Part 1 of the Scheme Rules contains the provisions for "Persons employed in the Civil Service." Rule 1.1 states that "This part of the scheme applies to persons serving in…the Civil Service…who: are injured…in any of the circumstances set out in Rule 1.3…". Rule 1.3 then sets out the "Qualifying conditions" for a PIB. It states:

> "…benefits in accordance with the provisions of this part may be paid to any person to whom the part applies and
>
> who suffers an injury in the course of official duty, provided that such injury is wholly or mainly attributable to the nature of the duty;
>
> …or

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

5. 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:
>
> 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 of the impairment of his earning capacity, the length of his service, and his pensionable earnings when his service ends;…"

6. Rule 1.7 provides that the annual allowance referred to in Rule 1.6 will, when added to certain other benefits, provide an income of not less than a guaranteed minimum. The guaranteed minimum incomes are set out in a table and vary according to length of service and level of impairment to earning capacity. There are four levels of impairment: slight (>10% but not >25%); impairment (>25% but not >50%); material (>50% but not >75%); and total (>75%).

7. Mr R started working for the Crown Prosecution Service (**the Employer**) in December 2005. In July 2008 he went on a long-term sickness absence.

8. In 2011, Mr R made an application for injury benefits under the Rules. Following correspondence between the then SMA (Capita Health) and the Employer, all relevant documents were provided to Capita Health in October 2011.

9. In November 2011, Dr Zubier of Capita Health, a specialist in Occupational Medicine, said:

> "This evidence confirms that Mr R developed impaired psychological health as a result of his perceptions of work place stresses. I consider this application meets the criteria for award of injury benefit."

10. In March 2012, the Employer forwarded the report to MyCSP to make a decision. MyCSP subsequently sought clarification from the Employer regarding Mr R's dates of sickness absence. MyCSP emailed the Employer on 3 April 2012, requesting a further statement from Mr R regarding the events that caused his sickness absence prior to July 2008. This was subsequently provided to MyCSP by Mr R.

11. In May 2012, MyCSP sent Mr R its decision that his injury benefit application had been rejected on the basis that his injury was not a qualifying one under the Rules. It said:

> "Issues concerning career progression and performance are dealt with by the Employer they do not come under the rules of the CSIBS. Both your statement and the management statement confirm your absence related to the lack of career progression and your perception of prejudice in your employer's recruitment procedures. Therefore your absences from 18 June 2008- 26 May

> 2010 and 25 October 2010- ongoing cannot be classed as a qualifying injury. There is no formal appeal procedure against the decision in not deeming an injury as a qualifying injury. However, if you are not satisfied with my decision you can have your case considered under the Internal Dispute Resolution Procedure [**IDRP**]."

12. Mr R completed an appeal form under stage one of the IDRP in May 2012. However, MyCSP has no record of receiving this.

13. On 28 February 2013, Mr R's employment ended on the grounds of incapacity, and he was eligible to apply for benefits from the CSIBS.

14. After Mr R's employment ended, he was placed under the care of a Mental Health NHS Trust, in whose care he has remained to the present day.

15. In June 2015, Mr R emailed MyCSP attaching a copy of his IDRP stage one appeal form. He requested that his appeal be dealt with by MyCSP. In his submissions, Mr R said he sought an appeal due to refusal of sick leave excusal and a temporary injury benefit (**TIB**) award for stress and depression which he attributed to issues at work.

16. In January 2016, the decision maker on behalf of MyCSP sent Mr R a response under stage one of the IDRP upholding his appeal. It said:

> "…I uphold your appeal against the decision made by MyCSP not to deem your injury as qualifying under the CSIBS for the reason of perception and that they felt your injury did not occur in the course of official duty. I have therefore instructed MyCSP to review their decision and inform you of the outcome of this, or provide you with an update, within two weeks of this determination…With regards to the delays you have encountered to your appeal under IDR process. It is clear from the evidence that you initially completed an IDR Stage 1 application form on 11 May 2012, shortly after MyCSP had informed you of their decision regarding your injury. Regrettably there is no evidence however of this being received by MyCSP and no evidence of you chasing for a response until 29 June 2015. There have been however delays in both acknowledging and then subsequently responding to your IDR appeal for which I apologise."

17. In February 2016, after reviewing its initial decision, MyCSP concluded:

> "There do not appear to be any other factors contributing to his illness therefore I would agree that Mr R's perception of events at work would appear to satisfy the criteria for a qualifying injury."

18. In February 2016, MyCSP paid Mr R a TIB award as a one-off payment for the periods from 8 July 2009 to 16 December 2009 and from 17 December 2009 to 28 February 2013.

19. On 2 March 2016, Mr R contacted MyCSP asking why his injury benefit award was being taxed and was not being paid beyond the date he left employment. MyCSP

explained that his TIB award was subject to tax. Unhappy, Mr R said he did not know he was in receipt of a temporary award instead of a permanent award. MyCSP wrote to Mr R on 21 March 2016 informing him that he would need to submit a new application for a PIB.

20. In May 2016, the Employer submitted Mr R's PIB application to MyCSP. MyCSP subsequently referred Mr R to the then current SMA, Health Assured (**HA**). HA asked a Consultant Psychiatrist, Dr Dooris, for an independent report. On 16 August 2016, Dr Dooris held a face-to-face assessment with Mr R. Mr R subsequently raised a formal complaint with HA about the consultation.

21. Mr R's case was referred to Dr Saravolac, Regional Clinician, for an assessment of Mr R's earning capacity. On 5 September 2016, Dr Saravolac concluded that "the degree to which the general earning capacity has been impaired only by the effect of the injury sustained through the cause of the incident are [*sic*] likely to be 50-70%". Excerpts from the medical evidence pertaining to Mr R's application and Dr Saravolac's report are provided in Appendix 1.

22. On 3 October 2016, HA sent Mr R a response to his complaint saying that it did not agree to his request that the record of the consultation with Dr Dooris be removed from its records.

23. In November 2016, MyCSP wrote to Mr R telling him that he was now eligible to receive a PIB and provided him with the figures.

24. In December 2016, dissatisfied with the assessment of the impairment of his earning capacity, Mr R appealed under the IDRP. In his submissions, Mr R said he had not been able to undertake any paid employment since he left the Employer and requested a review of Dr Saravolac's opinion.

25. In January 2017, MyCSP returned Mr R's injury benefit file to the Employer and asked it to complete the Employer's section as it had not been completed properly. This was because Mr R had sent the CSIBS2 application form directly to MyCSP and not to the Employer. MyCSP also asked the Employer to provide up to date medical evidence supporting Mr R's appeal.

26. Between January and April 2017, there were email exchanges between Mr R and MyCSP regarding his TIB award due to a change in his salary history. MyCSP said:

> "I can confirm we have received an email from [the Employer] confirming your salary history for the dates used in the calculation of your temporary injury benefit awards which match with the salary used in our calculation…Once this has been processed we will be in a position to revise your temporary injury benefit award due to the increase."

27. On 3 April 2017, the Employer sent MyCSP a completed CSIBS2. MyCSP identified that the Employer had not included the original file and issued a further request to the Employer.

28. In July 2017, the SMA changed from HA to Health Management Limited (**HML**).

29. On 13 September 2017, as part of the stage one IDRP raised by Mr R in December 2016, a Specialist Occupational Physician, Dr Raynal, issued her interim opinion. She said that Mr R had only provided sick notes for the period from 1 March 2013 to 25 February 2017, which stated he was unfit for work due to anxiety, depression and mental health issues. However, these did not provide sufficient medical evidence that was necessary to assess his case. Dr Raynal requested recent reports, dated within the last three months, from his treating psychiatrist on his current condition with up-to-date information on what treatments and response he had had for this condition.

30. In October 2017, MyCSP wrote to Mr R to notify him that its decision was not to uplift his level of impairment of earning capacity. It further said Mr R was now 12 months outside his appeal timeframe to further appeal.

31. On 17 October 2017, Mr R was awarded a PIB at 50-75% level of impairment of his earning capacity, which was backdated to the last day of his employment.

32. Mr R provided further evidence to Dr Raynal and on 15 December 2017 she issued her report to Mr R. Dr Raynal concluded that the level of impairment of Mr R's earning capacity should remain as 50-75%. However, Mr R did not permit Dr Raynal to release the report to MyCSP as he was not happy that the opinion was based on the most recent evidence rather than the evidence that was available in February 2013. Relevant sections of Dr Raynal's report can be found in Appendix 1.

33. On 20 December 2017, following Mr R's request to Dr Raynal to review the fact that his assessment should have taken into account only evidence that was available as at 28 February 2013, Dr Raynal added an addendum to the report of 15 December 2017 that said:

> "I have discussed this issue with a more experienced Scheme Medical Advisor to the Civil Service Pension Scheme. It appears that Mr R's understanding is incorrect. The degree to which the general earnings capacity has been impaired, only by the effects of the injuries sustained through the causal incident/s, is assessed <u>at the time of the application for the benefit or</u> application for a review/appeal against a previous award. It is based on an assessment of the likely future permanent incapacity up until pension age."

34. In February 2018, Mr R raised a complaint under stage one of the IDRP with MyCSP, In his submissions Mr R said:-

- The SMA had incorrectly considered evidence post-dating the date his employment ended. He believed the SMA should have considered the evidence that was available at the time he left employment.

- He was unhappy that MyCSP did not allow him to exercise an appeal under stage two of the IDRP as the allowed 12 months' timescale had lapsed.

- He would like his PIB to be granted on the same level of impairment of earning capacity as his TIB.

- He would like any changes to PIB backdated to 28 February 2013 and for the interest added to both PIB and TIB at the rate quoted by reference banks.

- Stage one of the IDRP, dated January 2016, should have advised him to apply for a PIB. However, he believed the decision maker might have understood that when the outcome was issued Mr R was still employed therefore in receipt of his TIB.

35. On 17 April 2018, MyCSP sent Mr R a response under stage one of the IDRP. It referred to the eligibility criteria for a PIB under Rule 1.6(i) and (iii) and Rule 1.10 review of awards and the Medical Reviews and Appeals Guide (**the Guide**), an extract from which is set out in Appendix 2. In summary it said:-

    - The CSIBS was designed to bring a member's income from specified sources up to a guaranteed minimum figure. Benefits were only payable in respect of loss of earning capacity and were not intended to compensate for loss of physical or mental capacity or pain and suffering.

    - There were key differences between a PIB and a TIB. Member's impairment of earning capacity was not medically assessed for a TIB; any allowance payable was calculated on the assumption that the member had total impairment; that was, their earning capacity had been impaired by more than 75%.

    - A member then would be referred to the SMA to ascertain whether an injury was qualifying when the injury was a work-related illness contracted in the course of official duty.

    - Rule 1.6(i) described the eligibility for a PIB in respect of a member who left employment before the scheme pension age of 60. Members whose earnings had been impaired by a qualifying injury might be paid an annual allowance in line with the level of impairment of earning capacity. Impairment of earning capacity was the medical assessment of the extent to which the member's earning capacity for the remainder of their expected working life had been impaired by the injury.

    - In respect of the date at which the SMA should assess a member, Rule 1.6(i) was open to interpretation and stated:

      "…according to the Scheme Medical Adviser's medical assessment of the impairment of his earning capacity, the length of his service, and his pensionable earnings when his service ends."

    - Guidance provided by the SMA clarified that the supporting documents provided with an application must cover the period from the commencement of employment in the Civil Service to the date of the application.

    - Any changes in Mr R's condition between leaving service and the date of his application could therefore be taken into consideration by the SMA, as it was

relevant to the question of the impact of his injury on his earning capacity for his expected working life.

- Rule 1.10 described scenarios under which an injury benefit award in payment can be reviewed. Rule 1.10a stipulated that Rule 1.10(i) did not apply where an injury was sustained on or after 1 April 2003. As Mr R's qualifying injury was sustained after that date, there was no provision within the rules for his benefit in payment to be reviewed once he was outside the 12-month formal appeal timeframe.

- It was clear that a delay occurred on the part of the Employer responding to MyCSP's requests. It also appeared that a further delay occurred as a result of the change in the appointed SMA and the transfer of his appeal.

- Neither delay was within Mr R's control; discretion should have been exercised by MyCSP to grant him an additional period of time in which to obtain and provide the further evidence the SMA had requested in their report of 12 September 2017.

- It upheld Mr R's appeal in part in respect of his right to pursue his first appeal to its conclusion. Mr R was permitted a further three months from the date of the decision to source and provide the further evidence the SMA had requested in their report of 12 September 2017.

- It asked Mr R to complete another CSIBS2 form and return it with relevant evidence, should he wish to proceed.

- Regarding Mr R's request for an interest payment, there were no provisions within the Scheme to give the person any right to it as it was a discretionary award.

- It also instructed the Employer to make an ex-gratia payment of £500 to Mr R in respect of its delay in providing the information to MyCSP which was required to submit his appeal to the SMA.

36. In June 2018, Mr R appealed under stage two of the IDRP to the Cabinet Office, as the stage two decision maker. In his submissions, Mr R asserted that the SMA did not consider relevant evidence and that its decision should have been based on the evidence that was available at the time he left employment. On that basis, the SMA would agree that he had total impairment of earning capacity because this is what he had been awarded as a TIB. He also provided Dr Arora's reports dated 13 October 2017 and 8 March 2018.

37. In November 2018, the Cabinet Office sent Mr R its stage two response. In summary it said that it had no power to overrule the SMA's assessment. It was satisfied that the SMA had followed the correct process and the decision was not perverse. It added:

> "When an individual leaves employment… the SMA must assess the level of impairment of earnings capacity to decide if there should be a permanent benefit, and at what scale. It does not follow automatically that a permanent

award will be the same as the temporary one- the SMA must make a formal assessment based on the evidence…I have not seen the last SMA report of December 2017, but it is clear that they [MyCSP] considered everything that was available to them at the appropriate time during the course of your appeals. For that reason, I am satisfied that the SMA properly considered everything relevant. Accordingly, I do not uphold your appeal."

Summary of Mr R's position

38. Mr R says:-

- His specialist Dr Arora disagrees with the SMA's assessment dated 15 December 2017 on the basis that it places its own interpretation upon the specialist's reports. Effectively the SMA "put words in the mouth" of Dr Arora.
- There is a provision under the rules that the medical evidence can be sent to a specialist not connected to the SMA, for an independent opinion, but this option has not been invoked in his case.
- It would seem logical that in such a situation where the SMA has placed an interpretation upon specialist advice, and the specialist who gave that advice stated that the interpretation is wrong, there should be another independent assessment done.
- He would like to be paid his PIB at the level of total impairment for the rest of his life.
- He was not told that he had to apply for a PIB. His understanding was that when he was awarded the backdated injury benefit in 2016 it was a permanent award and not a temporary one.
- At the time he left the Employer he was not informed of his entitlement to apply for a PIB.
- The Guide states that:

  "Impairment of earning capacity is assessed when a person is leaving employment."

- Dr Saravolac concluded in her report of 5 September 2016 that, without any treatment, he would be permanently incapacitated not just for his role but for any work and remained at the present time incapacitated for any work. This statement should refer to his incapacity as of February 2013.
- There were no changes in his condition between February 2013 and May 2016 when he applied for a PIB.

MyCSP's and the Cabinet Office's position

39. The Cabinet Office says:-

- One of the key reasons for Mr R's appeal coming to an end is that he did not give the SMA consent to release their report of December 2017 to MyCSP. Without the release of the report, neither it nor the SMA were in a position to consider the case further.

- The scheme rules do not make any reference to the processes the SMA must follow. It believes Mr R was referring to the procedural guidance, specifically paragraph 9.1.7 which states that the SMA makes the medical judgment about whether to refer a case to an independent physician where they consider a case to be border-line. The SMA makes that decision in the light of the medical evidence they review. Neither the Employer/ MyCSP nor the Cabinet Office have an authority to determine whether such a referral is appropriate or necessary.

- It understands that Mr R feels strongly that the SMA seems to have taken a different view to that of his own medical specialists. But it concluded in its IDRP stage two decision that it was satisfied that the SMA had considered all of the medical evidence Mr R had provided. It found nothing to suggest that the SMA did not follow due process or took account of anything irrelevant.

40. The Adjudicator wrote to the Cabinet Office raising the following points:

- She believed under Rule 1.6 the final caveat "when service ends" applies to all three of the preceding statements; the SMA's assessment, length of service and pensionable earnings.

- Therefore, the SMA should not have considered medical evidence dated after Mr R's last day of service when making their medical assessment.

41. In response to the Adjudicator's points, after seeking internal legal advice, the Cabinet Office said:

- The caveat under Rule 1.6 only refers to pensionable earnings.

- The use of the comma separates pensionable earnings from the other two criteria. There is no need to refer to "length of service when his service ends" because length of service is properly understood to mean whole length of service unless otherwise stated.

- Therefore, Rule 1.6 does not indicate that the SMA's assessment is limited to the member's last day of employment.

- In her report dated 5 September 2016, Dr Saravolac referred to the Guide. This is designed to cover the usual scenario where a PIB application is made at the time the person leaves service. There will be exceptions to this, such as in Mr R's

case. The SMA is asked to make an assessment on the individuals' earnings capacity for the rest of their working life.

- As the SMA reports are set out, Mr R had provided evidence from before his last day of service, it is also right to consider the evidence after his last day of employment. It would be "perverse" for the SMA to ignore any such evidence, given that their assessment looks at a person's working life.

- It was previously agreed that the permanency is implied in the terms of CSIBS. By the SMA not considering all available medical evidence, the SMA "would in effect be raising the bar for all members."

- In a scenario where a member leaves service and there are still medical options available, they subsequently try those treatments and they have not worked; the SMA could take that into account in a member's favour.

Adjudicator's Opinion

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

- There are essentially two elements to Mr R's complaint: the level at which the impairment of his earning capacity had been assessed; and whether the SMA should have considered medical evidence from the time he left employment and not more recent evidence.

- With regard to the assessment of earning capacity impairment, it is not my role to review the medical evidence and come to a decision as to the appropriate level of impairment. I am primarily concerned with the decision-making process. The issues considered included: whether the relevant rules have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision was supported by the available relevant evidence.

- Medical (and other) evidence was reviewed in order to determine whether it supported the decision made. However, the weight which was attached to any of the evidence was for the SMA to decide (including giving some of it little or no weight). Under rule 1.6 of the Rules, MyCSP must apply the SMA's assessment of impairment; unless there was a cogent reason why it should not or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser.

- It would not be appropriate for MyCSP to apply a level of impairment which was obviously incorrect simply because rule 1.6 placed the assessment role with the SMA. In addition, the Cabinet Office, as the scheme manager, had a general responsibility to oversee the application of the Scheme rules. If the evidence

indicated that there was a flaw in the SMA's assessment, either MyCSP or the Cabinet office (on appeal) could be expected to refer the case back for review.

- Mr R was assessed at the material (>50% but not >75%) level of impairment. This was on the basis of the report prepared by Dr Saravolac. Mr R's specialist Dr Arora, in his report dated 15 July 2016, concluded that Mr R had done well to have engaged in his treatment plan over the last three years in the Mental Health team's service, and was certainly improved from his initial presentation. However, he said it was difficult to give a clear prognosis with respect to functionality. Dr Saravolac said there were no indications of the nature of an injury, however, based on Dr Zubier's report, it would be reasonable to anticipate that the nature of the injury was impaired mental wellbeing. She noted an appointment was arranged for Mr R to be assessed by Dr Dooris but that appointment did not result in a report due to Dr Dooris being subject to a complaint raised by Mr R.

- Subsequently, in Dr Saravolac's view, on the balance of probabilities, Mr R was likely to restore his function to undertake some work in a supportive working environment on a part-time basis, subject to flexibility and adjustment to be provided to suit his health needs, including the ability to work from home. Having reviewed Dr Saravolac's report, the Adjudicator had not identified any error or omission of fact or misunderstanding of the relevant Rules which should have prompted MyCSP and/or the Cabinet Office to query her assessment.

- During the appeals process, another medical adviser, Dr Raynal, said that she was only provided with sick notes by Mr R saying he was unfit for work. Dr Raynal said further evidence, within the last three months, was required to make a proper assessment of Mr R's condition.

- Mr R did not consent for Dr Raynal's subsequent report dated December 2017, to be released to MyCSP for consideration. So, it was reasonable for MyCSP to have relied on Dr Saravolac's report to make a decision.

- In order to determine the correct approach, it was necessary to look at Rule 1.6 in the context of Part 1 of the Scheme rules as a whole. Part 1 only applied if the individual has suffered a qualifying injury (see Rule 1.1); that was, if he or she was injured in the circumstances set out in Rule 1.3. On that basis, the reference, in Rule 1.6, to impairment of earning capacity because of injury was to the impairment arising from the qualifying injury.

- Mr R felt the SMA should have made an assessment based on the evidence that was available when he left employment in February 2013 and not evidence that was provided in 2016. He believed that his PIB should be paid at the level of total impairment for the rest of his life and should be a continuation of the TIB.

- The Adjudicator considered the interpretation of the phrase "when service ends" within the Guide; the relevant section of which is set out in Appendix 2. This wording was also referenced in Dr Saravolac's report. In the Adjudicator's view, the

Guide was not a binding interpretation of the Rules. The Adjudicator also noted that the circumstances of Mr R's case were unusual in that there was a three-year gap between Mr R leaving employment in February 2013 and applying for PIB in March 2016.

- In the Adjudicator's view, the phrase in Rule 1.6 of the Rules "impairment of his earning capacity, the length of his service, and his pensionable earnings when his service ends" was not drafted with absolute clarity, particularly in light of the wording in the Guide. However, in the Adjudicator's opinion, the lack of comma between "pensionable earnings" and "when his service ends" was crucial and the phrase should be interpreted in light of the purpose of the Scheme, which was to provide a PIB award to those eligible to apply under the Rules for the period from injury to normal retirement age.

- In the Adjudicator's opinion, it was not an unreasonable interpretation of Rule 1.6 that the assessment should be made based on medical evidence available at the point the injury was sustained. However, on the basis of the Rules as drafted, the Adjudicator's view was that the Cabinet Office's interpretation of the Rules in this case was correct and the SMA could consider evidence from 2016 in its assessment of Mr R's permanent injury.

- The point at which service ended was an obvious point at which an injury would be assessed, and a three-year gap between leaving service and assessment was unusual. There was no provision in the Rules for a benefit to be reduced once it had been awarded. There was only a mechanism under Rule 1.10(a) to increase a benefit if the permanent injury worsened, which did not apply in Mr R's case. The implication of this was that the intention of the CSIBS was to provide a permanent level of benefit. So, it should not matter precisely when an assessment was carried out because, if the injury was permanent, it would remain in place regardless of the date of assessment.

- Further, the Guide did not provide a particular date by when an assessment must be carried out. It would always be the case that there was some gap between an application and a SMA assessment. This would naturally vary depending on a wide number of factors, including the complexity of the case and the availability of the SMA.

- Additionally, the Guide stated that the purpose of the assessment was essentially a prospective one to determine the permanency of the injury and "the extent to which the member's earnings capacity for the remainder of their expected working life has been impaired" which supported the interpretation that the precise timing of the assessment was not material.

- In any event, even if the wording in the Guide could not be reconciled with the Rules, ultimately the Guide was overridden by the Rules, and in the Adjudicator's view the Rules did not require the assessment to be made at the point a member left employment.

- Mr R believed that his PIB should be a continuation of TIB. However, a member's impairment of earning capacity was not medically assessed for TIB. Any allowance payable was calculated on the assumption that the member had total impairment; that was their earning capacity had been impaired by more than 75%.

- The Adjudicator noted there was no formal assessment of Mr R's PIB in 2013, so the earliest point at which an assessment of his impairment of earnings capacity could be made was in 2016 in any event. On that basis, in the Adjudicator's view, the SMA was reasonable in considering all medical evidence from 2016.

- The Adjudicator noted that the Cabinet Office, at stage two of the IDRP, referred to Dr Raynal's unreleased report of December 2017, stating:

  "I have not seen the last SMA report of December 2017, but it is clear that they [the SMA] considered everything that was available to them at the appropriate time during the course of your appeals. For that reason, I am satisfied that the SMA properly considered everything relevant."

- In the Adjudicator's view, it would have been prudent for the Cabinet Office to have qualified this statement as it was not aware of the content of the December 2017 report and was consequently unaware of whether that report did indeed consider everything relevant. However, this irregularity, in the Adjudicator's view, did not amount to maladministration. The Cabinet Office had seen the other SMA reports and supporting evidence on which MyCSP had reached its decision, so was entitled to reach a conclusion based on that material.

- The Adjudicator also noted that the Cabinet Office rightly recognised some delays had occurred during Mr R's application which were outside of its and Mr R's control. These were due to the Employer's administrative errors, the Employer taking longer than it ought to submit the application, and the change of SMA. Mr R was awarded £500 in recognition of these delays by the Employer. In the Adjudicator's view, this award was in line with my current guidelines and represented an appropriate level of redress.

- Mr R raised the argument that he was not told about the difference between the TIB award and the PIB award. He only discovered he was in receipt of the TIB award when tax was deducted in 2016. The Adjudicator appreciated this, however, as his application was dealt with by the Employer at the time, he might wish to raise this issue with the Employer. Further, this did not impact on the outcome of Mr R's PIB application. Consequently, it was the Adjudicator's view that this complaint should not be upheld.

43. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. I have noted the additional points raised by Mr R but I agree with the Adjudicator's Opinion.

Mr R's further comments

44. In summary, Mr R said:-

- The Adjudicator's initial view of the interpretation of Rule 1.6, before the Opinion was issued, was inappropriately influenced by the Cabinet Office's response from its legal team.
- In accordance with MyCSP's stage one IDRP decision[1], the latest date for any medical evidence could only be the date of his application for a PIB.
- He did not object to the SMA obtaining the reports of his treating specialists in July 2016.
- Dr Raynal's inappropriate request for recent reports from his treating doctors was the reason he did not consent to the release of her December 2017 report. That report should be "expunged" from the Opinion on the basis that it is a breach of data protection law.
- The significance of a single comma in the scheme rules, to when reports should correctly be obtained, is irrelevant in reaching any conclusion on his complaint.
- Dr Saravolac had misrepresented the content of the medical reports provided by his treating doctors, in concluding her assessment of the impairment of his earning capacity. This was asserted by Dr Arora. While the Adjudicator had noted this in her Opinion[2], the Adjudicator had not provided any comments or conclusions thereon.
- Clearly, the Adjudicator had not read Dr Saravolac's assessment of the impairment of his earning capacity in the context of the subsequent submissions from Dr Arora.
- The misrepresentation of Dr Arora's reports provided "cogent reason" why either MyCSP or the Cabinet Office should have referred his case for an independent expert review (not connected with the SMA).
- Nonetheless all the above was arguably an irrelevance since Dr Saravolac's opinion that he might recover sufficiently to return to some form of paid employment had been proven factually incorrect. He had continued to be continuously certified as unfit for any work.

45. Mr R has also commented that excerpts from the medical evidence included in the Appendix of the Adjudicator's Opinion omitted relevant comments made by Dr Arora in his reports to Dr Raynal of 13 October 2017 and 8 March 2018. But as Mr R refused the release of Dr Raynal's report these have no relevance to Dr Saravolac's

[1] See paragraph 35 above, eighth bullet point.

[2] See paragraph 38 above, first bullet point

earlier decision. Consequently, the extracts that Mr R has quoted have not been included.

Ombudsman's decision

46. Before I consider Mr R's substantive complaint, I will briefly address these ancillary issues he has raised in his submissions.

47. Mr R contends that the Adjudicator's Opinion was inappropriately influenced by the response from the Cabinet Office's legal team. In considering Mr R's complaint, the Cabinet Office was entitled to seek advice from its legal team and to provide those submissions to the Adjudicator. The Adjudicator was entitled to review the available evidence from both parties in reaching her initial view on Mr R's complaint, and indeed would not have been able to investigate impartially had she not taken the Cabinet Office's submissions into consideration. All material submissions from the Cabinet Office's legal team were set out in the Opinion and Mr R was given full opportunity to comment. I have reviewed the submissions and exchanges of information and do not find that the Adjudicator was in any way inappropriately influenced.

48. In response to the Opinion, Mr R stated his intention to seek his own legal advice. He was afforded extensive opportunity to do so but was only able to appoint a legal advisor shortly before this decision. I consider that his legal advisor has had a reasonable opportunity to provide comments but has not done so. Where the principle of natural justice demands equality of arms it may be appropriate for me to consider any disparity in parties' representation and to take this into account. However, in this case, I do not consider that the circumstances here justify further extensions of time beyond those already afforded to Mr R and his legal advisor to provide additional comments. The information received from the Cabinet Office's legal team states its position about the factual meaning of Rule 1.6. Although Mr R was, until recently, unrepresented and disagrees with this interpretation, simply because this interpretation was provided by a legal team rather than another team within the Cabinet Office does not justify me granting an indefinite extension of time for Mr R and his legal advisor to continue to advance arguments in support of his complaint.

49. Mr R has also essentially argued that he requires ongoing legal representation as a 'reasonable adjustment' to take into account his disability. I disagree. My office has granted Mr R multiple extensions of time in which to seek the legal advice he claims he requires, far beyond the deadlines ordinarily applied to parties by my office, and I have considered comments submitted by Mr R's legal representative. This was a reasonable adjustment to take into account Mr R's disability and the complexity of his complaint. The respondents have a legitimate interest in Mr R's complaint being determined in order that they can have finality in knowing the level of benefits he is entitled to under the CSIBS.

50. Mr R has also raised the issue of limitation, and he has stated that a limitation period expires shortly in respect of an employment dispute he has against his previous employer. I cannot comment on that claim, or the applicable limitation period, as this relates to a separate employment dispute outside the scope of the complaint my office agreed to investigate regarding Mr R's benefits under the CSIBS.

51. Mr R has raised a number of issues regarding Dr Saravolac's assessment of his impairment of earning capacity. He believes her assessment was incorrect. However, Dr Saravolac, who prepared the medical assessment dated 5 September 2016, had access to all Mr R's medical evidence available at the time. The opinion said:

> "Having reviewed available medical information, as noted above, in my opinion it would not be unreasonable to anticipate that [Mr R] with further available medical management activities is likely to gain some stability over time and prior to retirement age. Subsequently, on the balance of probability he is likely to restore his function to undertake some work in a supportive working environment on a part time basis, subject to flexibility and adjustment to be provided to suit his health needs, including the ability to work from home. As a result 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 cause of the incident are likely to be 50-70%."

52. I do not find that there has been any failure or injustice in the procedure carried out by Dr Saravolac and the decision reached based on information provided by Mr R's specialists and previous OH adviser. It was for Dr Saravolac to weigh up all the evidence and reach a conclusion. It is clear from her report that all medical evidence was taken into account and it was for Dr Saravolac to decide upon the weight to be given to any particular evidence. Mr R may place greater reliance on subsequent reports from Dr Arora dated 13 October 2017 and 8 March 2018, but that is not sufficient reason to set aside Dr Saravolac's conclusions.

53. Furthermore, as Dr Raynal's report was not released by Mr R to the Cabinet Office, it was reasonable for it to have attached weight to Dr Saravolac's report. I note there was a difference in medical opinion between Dr Saravolac and Dr Arora's subsequent reports. However, a difference of opinion is not, in and of itself, sufficient for me to find that MyCSP and/or the Cabinet Office should not have applied Dr Saravolac's assessment of the impairment of Mr R's earning capacity.

54. Mr R says Dr Saravolac's opinion that he might recover sufficiently to return to some form of paid employment has been proven factually incorrect. But that is applying the benefit of hindsight.

55. Mr R disagrees with the Adjudicator's interpretation of the phrase in Rule 1.6 of the Rules "impairment of his earning capacity, the length of his service, and his pensionable earnings when his service ends". He believes the lack of comma between "pensionable earnings" and "when his service ends" is irrelevant. However, I find the lack of comma between "pensionable earnings" and "when his service ends"

is crucial and the phrase must be interpreted in light of the purpose of the Scheme, which is to provide a PIB award for those eligible to apply under the Rules for the period from injury to normal retirement age.

49. I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
18 March 2022

Appendix 1

Summary of the Medical Evidence

Dr Arora, Consultant Psychiatrist, 15 July 2016

50. Dr Arora said:

> "The proposed plan is to continue support from our service (with a psychiatrist and vocational worker) with a view to discharge from secondary care to primary care services when he is ready. There is no defined discharge date at this time.
>
> [Mr R] has done well to have engaged in his treatment plan over the last 3 years in our service, and is certainly improved from his initial presentation. It is difficult to give a clear prognosis with respect to functionality, given that there is residual anxiety and low mood that is contextual to the ongoing stressor and may perpetuate given his sense of loss of potential. He has been out of work for a considerable amount of time, and would be unlikely to be able to return to his premorbid level of functioning. The caveat here is that I am not an occupational health specialist, and so would be guided by [Mr R] himself, or more specialist assessment."

Dr Saravolac, Regional Clinician – Health Assured, 5 September 2016

51. Dr Saravolac said:

> "There are no indications and clear statement on the nature of the injury, however, based on Dr Zubier's report it would be reasonable to anticipate that the nature of the injury is impaired mental wellbeing (stress/depression).
>
> …
>
> As you will be aware in order to consider this gentleman's permanent injury benefit application we approached and received a report from his specialist Dr Arora Consultant Psychiatrist who also enclosed a report from vocational recovery services. Subsequently we arranged a face to face assessment to gather some more relevant medical and functional information before being in the position to provide you with the level of impairment. However, you would be aware that the doctor who met with [Mr R] (Dr Dooris on 16 August 2016) was unable to provide the requested report due to circumstances at the consultation that is subject of a formal complaint at present. Outcome of a formal complaint submitted by [Mr R] is pending. Subsequently we do not have the benefit of such a report. I note that [Mr R] offered to provide a further statement from himself, however, I do note that his statements in relation to [his] injury benefit application are available in the case file, including his letter of 17 August 2016 regarding Dr Dooris' face to face assessment on 16 August 2016.

…

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.

Medical evidence available confirms that [Mr R] was diagnosed with anxiety and depression (impaired mental wellbeing) in July 2008 on the background of his perception of unfair treatment within the working environment. Medical evidence further suggests that he has been under the care of a specialist as well as secondary care mental health services since 2013. It is commented by his specialist that as part of this he was initially under the Crisis and Home Treatment Team due to his high vulnerability, and then he has been followed up with a psychiatrist in an outpatient setting which is ongoing. It is further indicated that he is attending talking therapy via psychotherapy services and vocational support. It is further commented by the specialist that he has tried anti-depressants though these have not been on balance effective, with psycho social intervention being the primary modality of treatment. He also confirmed that the proposed plan is to continue support from specialist services whilst there is no definitive discharge date at this time.

…

Considering the nature of this gentleman's condition and length of time he has been experiencing his symptoms, it would be reasonable to suggest that spontaneous improvement is unlikely. Furthermore it would be reasonable to conclude that without any treatment [Mr R] would be permanently incapacitated, not just for his role but also any other gainful employment. I note that he has been engaged with specialist services for 3 years and that he is in support of comprehensive medical management activities. I further note that he gained some improvement compared to initial medical management activities. I further note that he gained some improvement compared to initial presentation, however [he] continues to experience significant functional limitations and remains at the present time incapacitated for any work. I note that this treatment is to continue to take place, however, considering the nature of his role and difficulties relating to the working environment, it is unlikely that [Mr R] despite further treatment would regain sufficient recovery to resume full requirement of his role. It is then question to whether or not [Mr

> R] with further available medical management activities would regain sufficient functional improvement and ability to undertake some work in the future and before his retirement. I note this comment provided by his specialist that he is unlikely to return to his premorbid state although the specialist indicated that an occupational health physician would be in a better position to assess his potential ability to work in the future. I note the comment provided by Margaret Delaney at the vocational functional assessment that his earning capacity and career prospects have been permanently and significantly impaired. As noted above, an appointment was arranged for [Mr R] to be assessed by an occupational health physician on behalf of Health Assured, however that, for the reasons noted above, has not resulted in obtaining the relevant report.
>
> Having reviewed available medical information, as noted above, in my opinion it would not be unreasonable to anticipate that [Mr R] with further available medical management activities is likely to gain some stability over time and prior to retirement age. Subsequently, on the balance of probability he is likely to restore his function to undertake some work in a supportive working environment on a part time basis, subject to flexibility and adjustment to be provided to suit his health needs, including the ability to work from home. As a result 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 cause of the incident are likely to be 50-70%."

Dr Arora to Dr Raynal, 13 October 2017

52. Dr Arora said:

> "[Mr R] has continued engagement with our vocational worker, and has been able to access a psychotherapist in our service for ad hoc review. He does not have active psychotherapy, however, nor further appointments with myself. His mental state is essentially unchanged since my last report, with residual anxiety and low mood that impairs his occupational potential. I am not expecting further improvement, and he is likely to be discharged from our service shortly, not because he has improved, but because there is little further our service can do, and the prognosis will not change with further intervention. He can be re-referred by his GP if his mental state deteriorates, and has access to our 24 hour support line."

Dr Raynal, Specialist Occupational Physician for HML,15 December 2017

53. Dr Raynal said:

> "The recent report from Dr Arora, Consultant Psychiatrist, dated 13 October 2017, states that this was an incorrect interpretation and that in her [sic] view his mental state is essentially unchanged since her [sic] previous report, when she [sic] noted "*it is difficult to give a clear prognosis with respect to*

functionality, given that there is residual anxiety and low mood that is contextual to the ongoing stressor and may perpetuate given his sense of loss of potential."

In my interim report to you dated 12 September 2017, I note that I interpreted the previous records showing that Dr Saravolac had provided her advice based on the report from the Consultant Psychiatrist, Dr Arora, dated 15 July 2016, which enclosed a vocational functional report. The recent report from Dr Arora, Consultant Psychiatrist, dated 13 October 2017, states that this was an incorrect interpretation and that in her [sic] view his mental state is essentially unchanged since her [sic] previous report when she [sic] noted *"it is difficult to give a clear prognosis with respect to functionality, given that there is residual anxiety and low mood that is contextual to the ongoing stressor and may perpetuate given his sense of loss of potential.*"

Dr Arora also noted in the report of 13 October 2017 that he does not have active psychotherapy or appointments with herself [sic]. Her [sic] letter of 23 January 2017 stated that he did not need to be followed up by her [sic] service.

[Mr R] has also sent in the summary records from his GP for these attendances and medical reports from 1 September 2016 up until 20 October 2017. These show that he has not been attending for any active mental health problems in that period. There is only one entry about his longstanding depressive illness on 23 February 2017 in which it is noted that he is not on any medication for this condition and that he is not under psychiatric follow up. The entry notes that he is able to self-refer back for talking therapies if needed. I interpret this as showing that he was not actively affected by his mental health problems during this period and that this condition did not affect earnings capacity significantly in this period.

…

The medical evidence shows that [Mr R] has in recent times been significantly affected by a number of other medical conditions, which are likely to have undermined his resilience and hence his work capacity. There is no clear evidence that he continues to be significantly affected by his depression/anxiety, although he may remain vulnerable to this. There is also evidence that [Mr R's] childhood, family and relationship circumstances are likely to have played a significant role in his long-term depression/anxiety propensity.

The GP has continued to issue sick notes stating that [Mr R] is not fit for work, even though he has not been employed for some time. The entry on 23 February 2017 in his GP records notes that he continues to request sick notes to assist with his ongoing employment issues. For GPs, their first obligation is

> to their patients and GPs do not have specialist occupational medical expertise to assess fitness for work.
>
> Dr Arora has provided a view on his current mental health status, but is not required to give a view on the impairment of his earnings capacity **only** from the injury at work. From the new medical information made available for this review, there is good evidence that other medical conditions are impeding his earnings capacity, hence I cannot support an increase in the level advised by Dr Saravolac of 50-75%." (original emphasis)."

Dr Arora to r Raynal, 8 March 2018.

54. Dr Arora said:

> "I am writing in response to a report you wrote dated 15.12.17, provided to us by [Mr R]. You did not request a letter or report from me; however I felt it important to clarify a couple of matters.
>
> …
>
> You state on page 2 that, with reference to my report and the GP record, you "interpret this as showing that he was not actively affected by his mental health problems during this period and that this condition did not affect his earnings capacity significantly in this period."
>
> This does not accord with the content of the report of mine which you reference, which stated that there was:
>
> "residual anxiety and low mood that impairs his occupational potential." I further clarified that: "I am not expecting further improvement, and he is likely to be discharged from our service shortly, not because he has improved, but because there is little further our service can do, and the prognosis will not change with further intervention. He can be re-referred by his GP if his mental state deteriorates, and he has access to our 24 hour support line."
>
> So less contact with our service does not mean he is not suffering with mental health difficulties that impact on his function, rather than he has not further deteriorated."

Appendix 2

Medical Reviews guidance

> “A person is eligible for a permanent injury benefit when they suffer a qualifying injury that impairs their earning capacity. Impairment of earnings capacity is assessed when the person is leaving employment (including moving to a lower grade or undertaking part-time working because of the injury. See the – CSIBS rules for more information). Impairment of earnings capacity is a medical assessment of the extent to which the member’s earnings capacity for the remainder of their expected working life has been impaired by the qualifying injury, and must always be carried out by the Scheme Medical Adviser (SMA). It is part of the overall evidence that the Scheme Administrator (MyCSP) or the employer must look at when making a decision about awarding injury benefits.”