PO-28030

Ombudsman's Determination

Applicant	Mr W
Scheme	Civil Service Injury Benefits Scheme (**CSIBS**)
Respondents	MyCSP and The Cabinet Office

Outcome

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

Complaint summary

2. Mr W has complained that his permanent injury benefit (**PIB**) has not been calculated correctly and he should be awarded the highest level of benefit. Mr W also says that MyCSP and the Cabinet Office have taken too long to consider his appeal.

Background information, including submissions from the parties

3. The relevant rules are the Civil Service Injury Benefits Scheme Rules (as amended). 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
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> (i) 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
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> (ii) … or
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> (iii) who contracts a disease to which he is exposed wholly or mainly by the nature of his duty …"

5. Rule 1.5 provides that reference to "injury" in the following provisions of the scheme should be taken to include a reference to "disease". 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:
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> (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 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 (**GMI**). 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 W was employed by the Department for Work and Pensions on a part time basis and in March 2013 injured his back in a non-work-related incident and took sick leave from 3 April to 25 April 2013. He returned to work from 3 June 2013. Mr W injured his back again at work on 20 November 2013 and took sick leave from 26 November. He did not return to work before he was dismissed on 21 May 2014.

8. Before leaving employment Mr W made an application for injury benefits under the CSIBS. In October 2014 MyCSP wrote to Mr W with its decision that his injury did not qualify for a PIB, based on advice from the Scheme Medical Adviser (**SMA)**. Mr W appealed against that decision and supplied new medical evidence. The appeal was unsuccessful, and in May 2016 Mr W initiated the Internal Dispute Resolution Procedure (**IDRP**).

9. Mr W's application under Stage 1 of the IDRP was unsuccessful and he initiated the Stage 2 IDRP. The Stage 2 IDRP decision was issued in January 2017 and concluded that MyCSP should refer Mr W's case back to the SMA for further advice. This decision was reached by the Cabinet Office as it felt the medical evidence suggested that Mr W's injury at work in November 2013 had caused a soft tissue injury.

10. Following the Stage 2 IDRP decision MyCSP referred the case back to the SMA. On reviewing the case papers, the SMA concluded on the balance of probability that Mr W had sustained a soft tissue injury in the incident in November 2013. The SMA also said:

> "In providing this advice, I did not anticipate the requirement for a permanent award linked to this incident. As you are aware, the impairment of earnings assessment relates solely to the consequences of the injury and the medical evidence clearly indicates that this soft tissue injury would have

> resolved within 9 months of the incident and that Mr W's on-going symptoms result from Mr W's pre-existing back problems. The soft tissue injury is therefore unlikely to have had any permanent adverse effect on Mr W's earning capacity."

11. On the basis of this advice MyCSP decided that Mr W had suffered a qualifying injury and asked his former employer to make any necessary adjustments to his pay and service history.

12. Mr W did not accept that a PIB had not been awarded and appealed to MyCSP under the first stage IDRP. MyCSP issued its IDRP Stage 1 decision on 28 September 2017 and concluded that Mr W did not qualify for either a temporary or permanent injury benefit. Mr W made an application for a Stage 2 IDRP decision to the Cabinet Office on 25 November 2017, and enclosed a number of supporting documents including a GP's report dated 21 November 2017.

13. On reviewing the papers and the new medical evidence provided, the Cabinet Office decided to refer the case back to MyCSP to contact the SMA for further advice and to take into account the GP's report of November 2017.

14. The Cabinet Office says that due to the complexity of the case the referral to the SMA took several months to complete and Mr W was kept updated on progress. During this time Mr W's claim for a retrospective ill health retirement (**RHIR**) claim was being processed and he attended a medical appeal board as part of that claim in June 2018. On 16 July 2018, the SMA confirmed that it had completed its work on the RHIR claim and was now in a position to review Mr W's CSIBS claim.

15. On 24 July 2018 the SMA sent Mr W an advance copy of its report on his CSIBS claim. In its report the SMA confirmed it had considered the entire available medical evidence and other documentary evidence submitted. The medical evidence considered included:-

    Reports from Mr W's specialist dated 22 September 2014
    Reports from the GP dated 28 March 2018 and 21 November 2017
    Notes from consultations with Scheme Adviser dated 20 February 2017
    The Ill Health Retirement Appeal Report dated 30 June 2018
    The Industrial Injuries Benefit Report dated 2 April 2015.

16. The SMA stated that the estimate of the degree to which Mr W's general earnings 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.

17. On 14 August 2018 MyCSP wrote to Mr W to explain what would happen next and enclosed forms for him to complete. The Cabinet Office also emailed Mr W with an update on 24 August 2018.

18. On 24 September 2018 the Cabinet Office contacted Mr W by telephone and followed this up with an email to confirm that MyCSP were bringing together the processing of his RIHR and CSIBS awards. The Cabinet Office also asked if this had now resolved his IDRP appeal.

19. On 9 October 2018 Mr W emailed the Cabinet Office to say that he did not accept that his IDRP appeal had been resolved. Mr W said that he disagreed with the SMA's assessment of the effect that his qualifying injury had on his earnings capacity and the length of time taken to complete the IDRP process.

20. On 5 November 2018 the Cabinet Office wrote to Mr W to confirm its Stage 2 IDRP decision and said:

> "Decisions about whether a qualifying injury has occurred for the purposes of CSIBS benefits rests with MyCSP. In cases involving musculoskeletal conditions, MyCSP make their decision with the benefit of advice from the SMA. In your case the SMA advised that you had suffered a soft tissue injury which had not resulted in permanent impairment of your earnings capacity. They gave their advice based on the medical evidence available at that time. The SMA has since advised MyCSP that your back problem is 50% to 70% attributable to the incident at work in November 2013, causing you slight impairment of earnings capacity. The SMA gave this opinion with the benefit of your GP report of 21 November 2017 which you provided to support your second stage IDR appeal. As this evidence was not available to the SMA for their earlier reviews, I do not agree that MyCSP should have referred your case back to the SMA as part of their first stage IDR investigation because you did not submit your new medical evidence until you made your second stage IDR appeal.
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> MyCSP accepted your claim for a permanent injury allowance on the basis of the SMA's advice of 17 July 2018. This was an apportionment assessment of 50% to 70% and an impairment assessment of 10% to 25%. You disagree with the SMA's assessments because you think they are at odds with the medical board findings for your RIHR case and your GP report of 21 November 2017. Both of these refer to a report from Dr Braithwaite dated 9 December 2014 from which your GP concludes: "The spinal injuries sustained by Mr W in the accident on 20th November 2013 have resulted in a permanent and total impairment of his earnings capacity as outlined in the Civil Service Injury Benefit Scheme rules"
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> As part of my full case review, I have paid particular attention to these reports. Having done so I am satisfied that the SMA assessment of 17 July 2018 has taken into account all the relevant medical evidence. The SMA has assessed your back problems as being mainly attributable to the incident at work in November 2013 with an apportionment of 50 to 70%. To this extent the SMA is in agreement with Dr Braithwaite's opinion that you satisfy the qualifying criteria for an award under the CSIBS. However, as Dr Braithwaite has explained, you were suffering from a chronic widespread spinal condition when you presented

> to him in 2000 and in 2005, your ongoing issues were arthritic change in your cervical, thoracic and lumbar spine, arthritis in your right hip and problems with your left ankle. Dr Braithwaite has also confirmed that your MRI scan in June 2014 (some 7 months after the accident at work) showed moderate degenerative changes in your lumbar spine but no evidence of traumatic damage. The SMA's apportionment and impairment assessments take all this information into account and I do not find these assessments unreasonable in the light of the available evidence. Unfortunately, these assessments, combined with the other factors involved in the calculation of a permanent injury allowance, do not result in an award for you. However, whilst having much sympathy for your position, for the reasons set out above I do not uphold your appeal."

21. Mr W says that he disagrees with the level of impairment of earnings that has been awarded. He has been awarded the lowest level of impairment and he believes he should be awarded the highest level as supported by medical evidence from his GP. His claim is supported by his GP and the Cabinet Office have not explained the conflict between the GP's opinion and the SMA's opinion on this point.

22. Mr W says that the GP has written a clear and unequivocal medical report which leaves no doubt as to what is his entitlement to PIB which has been completely ignored by the SMA and as a result the level of apportionment is incorrect. Mr W believes that the Cabinet Office has placed too much reliance on a report from his specialist Mr Braithwaite dating back to 2014. In addition, MyCSP and the Cabinet Office have taken too long to consider his appeal and have taken longer than the Regulator's time guideline which has caused him severe distress, anxiety and inconvenience.

23. Mr W also says he has had to fight for his appeal to be considered properly because avoidable mistakes have been made all along the way by every party. An independent Medical Appeal Board held on 30 June 2018 for the purposes of a Stage 3 Retrospective Ill Health Retirement Appeal has determined that the impairment on 21 May 2014 (the date of his dismissal from DWP) caused by the injury sustained on 20 November 2013 is higher than 90% (an Upper Tier award of Ill Health Retirement). It therefore follows that the level of apportionment for PIB should be the same that is higher than 90%.

Adjudicator's Opinion

24. Mr W'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 summarised below.

25. There are essentially two elements to Mr W's complaint: the level at which the impairment of his earning capacity has been assessed; and the way in which his appeal was handled.

26. With regard to the assessment of earning capacity impairment, the Adjudicator explained that it is not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to the appropriate level of impairment. The Ombudsman is primarily concerned with the decision-making process. The issues considered included, whether the relevant rules had been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision is supported by the available relevant evidence.

27. Medical (and other) evidence is reviewed in order to determine whether it supports the decision made. However, the weight which is attached to any of the evidence is for the SMA to decide (including giving some of it little or no weight). Under rule 1.6, MyCSP must apply the SMA's assessment of impairment; unless there is 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.

28. It would not be appropriate for MyCSP to apply a level of impairment which was obviously incorrect simply because rule 1.6 places the assessment role with the SMA. In addition, the Cabinet Office, as the scheme manager, has 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.

29. Mr W has been assessed at the slight (10% to 25%) level of impairment. This is on the basis of the report prepared by the SMA. Mr W has raised a number of issues relating to the SMA's assessment:-

- Mr W disagrees with the level of impairment of earnings that has been awarded. He believes he should be awarded the highest level as supported by medical evidence from his GP. His claim is supported by his GP and the Cabinet Office has not explained the conflict between the GP's opinion and the SMA's opinion on this point.

- Mr W says that the GP has written a clear and unequivocal medical report which leaves no doubt as to what is his entitlement to PIB, which has been completely ignored by the SMA.

- An independent Medical Appeal Board held on 30 June 2018, for the purposes of a Stage 3 Retrospective Ill Health Retirement Appeal has determined that the impairment on 21 May 2014 (the date of his dismissal from DWP) caused by the injury sustained on 20 November 2013 is higher than 90% (an Upper Tier award of Ill Health Retirement). It therefore follows that the level of apportionment for PIB should be the same, that is higher than 90%.

- Mr W believes that the Cabinet Office has placed too much reliance on a report from his specialist Mr Braithwaite dating back to 2014.

- Finally, MyCSP and Cabinet Office have taken too long to consider his appeal; it is longer than the Regulator's time guideline and has caused him severe distress, anxiety and inconvenience.

30. In order to determine the correct approach, it is necessary to look at rule 1.6 in the context of Part 1 of the Scheme rules as a whole. Part 1 only applies if the individual has suffered a qualifying injury (see rule 1.1); that is, if he or she is 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 is to the impairment arising from the qualifying injury.

31. In its report of 24 July 2018, the SMA, confirmed that all available evidence including the GP's reports, the reports from the specialist, Mr Braithwaite, and the Medical Appeal Board had been considered in relation to the qualifying injury. The Adjudicator was of the view that the SMA had sufficient evidence to assess and make a recommendation as to Mr W's level of permanent impairment to his earning capacity arising solely from his qualifying injury and the recommendation made was reasonable.

32. Mr W says that the SMA should have placed greater reliance on the report from his GP and, in his view, it had been ignored. Also, that the SMA placed too much reliance on the reports from the specialist in 2014. But it is clear from the SMA's report that the GP's reports were taken into account and it was not unreasonable for the SMA to also take into account the reports from Mr Braithwaite which showed that there were other pre-existing conditions. It was the SMA's role to consider all of the evidence and decide upon a recommendation, and it was for the SMA to decide upon the weight to be given to any particular evidence. To a large extent, the information required by the SMA is a matter for his or her professional judgment. In exercising that judgment, the SMA is subject to his or her own professional code of conduct and is not subject to the Ombudsman's jurisdiction.

33. Mr W has also referred to the fact that an independent Medical Appeal Board assessed him as having a higher than 90% impairment when determining a retrospective ill health retirement appeal. However, this assessment was undertaken in relation to Mr W's eligibility for benefits under an entirely separate scheme with its own criteria. The SMA was required to come to an independent assessment for the purposes of rule 1.6.

34. Having reviewed the SMA's report, the Adjudicator did not identify any error or omission of fact or misunderstanding of the relevant rules which should have prompted MyCSP and/or the Cabinet Office to query the assessment. The Adjudicator accepted that there is a difference of opinion between the GP and the SMA. However, a difference of opinion is not, in and of itself, sufficient to find that MyCSP should not have applied the SMA's assessment of the impairment of Mr W's earning capacity.

35. Mr W has also complained about the time taken to consider his appeal and says that this has caused him severe distress, anxiety and inconvenience. The Adjudicator noted the Cabinet Office's comments regarding this and that it took from February to September 2018 for the second stage IDR to be completed. The position was complicated as the SMA waited until the RHIR appeal was completed before reviewing all of the medical evidence, including the report from the Appeal Board. The Appeal Board did not reach a decision until the end of June 2018, and Mr W was kept appraised of the position throughout this period. Therefore, although the time taken to complete the IDRP appeal may have been greater than the Pensions Regulator's guideline, the Adjudicator was not of the view that it could be said to amount to maladministration, or should warrant an award.

36. Mr W did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr W provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by Mr W for completeness.

37. Mr W says that his consultant, Mr Braithwaite, stated in his report dated 9 December 2014, following the non-work related incident in March 2013, that his back condition was worse for a short period and got better such that it was back to its 'pre-accident state.' Mr Brathwaite also says:

> "In November 2013 a chair collapsed at work aggravating his low back pain, but this time his back pain has not improved, and as a direct result of this accident he was off work for six months before being dismissed. Due to this accident his incapacity and inability to work is ongoing."

Mr W says there is no mention in the report from Mr Braithwaite of any pre-existing conditions or of any other medical reason being a contributory factor towards his inability or incapacity to work following the accident. There is also no mention of a soft tissue injury.

38. Mr W says the Adjudicator stated "that due to the complexity of the case the referral to the SMA took several months to complete and during this time his claim for a RIHR claim was being processed" (see paragraph 14 above). But the Adjudicator also stated that this RIHR assessment was undertaken in relation to Mr W's eligibility for benefits under an entirely separate scheme with its own criteria and the SMA was required to come to an independent assessment for the purposes of rule 1.6 (see paragraph 33 above). Therefore, the question arises that if his application for Injury Benefit was "under an entirely separate scheme with its own criteria" from his application for RIHR, then why did Cabinet Office make him wait until his RIHR application had been completed by the Medical Appeal Board before continuing with his Second Stage IDR regarding Injury Benefit?

39. Mr W has raised a number of issues relating to the procedure followed by the SMA, Dr Rayner, when he first applied for PIB. Mr W says that the SMA failed to obtain any report from his GP and said in its report:

> "We wrote to Mr [W]'s GP in June 2014 for a report on the clinical findings immediately after the above accident, but this has not been forthcoming, despite several reminders. We do not have his consent to approach any other doctor for a report. Hence we have had to rely on Mr [W]'s occupational health records for the evidence."

40. Mr W says that he had contacted his GP's surgery regarding this and discovered that it had received such a request but had asked Capita Health & Wellbeing to pay a £65 fee for the report. As no fee was received the GP did not prepare a report. Mr W says that if the requested medical report had been obtained from the GP, then from the outset in August 2014, all appropriate and relevant medical evidence could have been obtained and considered in order to make an informed medical assessment on his eligibility for Civil Service Injury Benefit by the SMA.

41. Mr W has also raised the issue of the time taken to complete the IDRP. He says that he submitted his Stage 2 IDRP in November 2017 and it is recorded as being received by the Cabinet Office on 4 December 2017.

Ombudsman's decision

42. Mr W has raised a number of issues regarding the report from his consultant, Mr Braithwaite, dated 9 December 2014. He says that there was no mention in the report of any pre-existing conditions or of any other medical reason being a contributory factor towards his inability or incapacity to work following the accident. There is also no mention in this report of a soft tissue injury.

43. I do not disagree with Mr W's submission but the SMA, who prepared the medical assessment report dated 17 July 2018, on impairment of earnings and apportionment for CSIB, had access to Mr Braithwaite's reports as well as reports from Mr W's GP. The SMA also took account of the Appeal Board report for his application for RIHR. I do not find it unreasonable for the SMA to have awaited the report from the Appeal Board for the RIHR application, as it would have given an up to date record of Mr W's medical condition.

44. The SMA, having considered all the available information concluded:

> "Mr [W] has multiple problems, not only his chronic back pain, but in particular, arthritis of his right hip, which his orthopaedic surgeon describes as "a significant problem. The natural course of degenerative changes is to deteriorate over time and whilst his soft tissue injury may have aggravated his symptoms for a period of time, it is likely that his symptoms would have deteriorated over the natural course of the disease. In any case, the arthritic changes in his right hip are not attributable to his alleged incident nor the issues in his ankle. Therefore, it would appear that Mr [W's] ongoing disability is multifactorial and not wholly related to the qualifying injury awarded in February 2017.
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> …

> Having considered the information available, I would assess the extent to which Mr [W's] earnings have been permanently reduced as a result of his qualifying injury as lying in the 10-25% band."

45. I do not find that there has been any failure or injustice in the procedure carried out by the SMA and the decision reached was in full cognisance of the information provided by Mr Braithwaite. It was for the SMA to weigh up all the evidence and reach a conclusion. Although Mr W may place greater reliance on the report from Mr Braithwaite that is not sufficient reason to set aside the SMA's conclusion.

46. Mr W has raised concerns over the initial assessment carried out by Capita Health & Wellbeing and its failure to obtain a GP's report. Mr W says that if the requested medical report had been obtained from the GP, then an informed medical assessment on his eligibility for PIB could have been made from the outset in August 2014.

47. I accept that it may have been helpful if the initial SMA had obtained a GP's report. But it was for the SMA to decide if it was necessary to pay a fee of £65 for a GP's report or whether there were sufficient other reports on which to make a decision. I am also aware that there is an FAQ on the Civil Service Pensions website regarding ill health retirement which says an SMA:-

> **"**will not pay in advance for medical reports from your doctor or specialist. This is because there is no guarantee of the quality of the report, how long it will take the doctor to provide it, or even that it will be provided."

48. So, I do not consider that Dr Rayner acted incorrectly in not obtaining a GP's report in June 2014, as it was standard practice to not pay fees in advance. Even had I thought that this was an omission on Dr Rayner's part, it was corrected by the subsequent SMA's review where reports from Mr W's GP were considered.

49. I am not convinced that the obtaining of a GP's report in June 2014 would have led to a different conclusion. On the balance of probability, I find it more likely than not that the SMA would still have reached the same conclusion and Mr W would have raised a complaint. So, the timeline to have reached a final conclusion would not have been any less.

50. Mr W has also complained about the time taken to complete the IDRP. I agree that Mr W submitted his application in November 2017 and the process was completed in September 2018. But the actual process of obtaining the SMA's report did not commence until after Mr W had returned the forms to allow the referral to the SMA. These were not received until February 2018, and hence the Adjudicator referred to the process taking from February to September 2018, (see paragraph 35 above). I do not consider the timescale unreasonable in these particular circumstances.

51. I do not uphold Mr W's complaint.

PO-28030

Anthony Arter

Pensions Ombudsman
14 July 2020