CAS-64030-Y0H3

Ombudsman's Determination

Applicant	Mr N
Scheme	Civil Service Injury Benefit Scheme (**the Scheme**)
Respondents	The Home Office (**the HMO**)
	MyCSP
	Cabinet Office (**the CO**)

Outcome

1. Mr N's complaint against the HMO and MyCSP is partly upheld. To put matters right the HMO and MyCSP shall, in total, pay Mr N £2,000 in recognition of the distress and inconvenience caused. Of this sum, the HMO shall pay Mr N £500 and MyCSP £1,500.

Complaint summary

2. Mr N's complaint concerns the handling and outcome of an injury benefits application that he submitted for consideration in 2015.

Background information, including submissions from the parties

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

4. On 22 July 2002, the Scheme was established under Section one of the Superannuation Act 1972 and came into force on 1 October 2002. The Scheme is administered in accordance with the Civil Service Injury Benefits Scheme Rules (**the Rules**).

5. Rule 1 (ii) states:

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

6. Rule 1(iv) states:

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

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

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

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

8. As relevant, Rule 1.3, 'Qualifying conditions', provides:

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

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

(ii) who suffers an injury other than in the course of official duty as a result of an attack or similar act which is directly attributable to his being employed, or holding office, as a person to whom the scheme applies; or

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

9. As relevant, rule 1.6, 'Eligibility for benefits', provides:

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

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

…

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

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

10. Rule 1.7, 'Scale of benefits', provides: "Subject to rule 1.9a, the annual allowance under rule 1.6 will be the amount which when added to the benefits specified below, will provide an income of not less than the guaranteed minimum shown in the table below and appropriate to the circumstances of the case."

11. In March 2015, Mr N submitted an injury benefit application to his employer, the HMO, on the grounds that he suffered from Chronic Fatigue Syndrome-Myalagic Encephalomyelitis (**CFS-ME**). He said that the symptoms of his condition were recently exacerbated by the HMO's inability to make reasonable adjustments, in relation to his role, to accommodate his disability.

12. On 15 April 2015, Mr N submitted a HGR01 Grievance Notification form to the HMO and said:

- The HMO failed to make reasonable adjustments to his workplace, based on the findings of a recent occupational health assessment. This had resulted in an extended period of sick leave, despite himself being ready to return to work.

- In failing to make reasonable adjustments, he felt that the HMO was in breach of the Equality Act 2010 (**the Equality Act**). His period of absence, between 2 July 2014 to 6 August 2014, and from 16 September 2014 to 19 January 2015, should be classed as disability leave, not sickness leave.

- He tried to resolve this matter with the HMO on a number of occasions, with no response. In December 2014 he contacted a Department for Work and Pensions disability adviser who instructed Remploy[1] to help. He also referred the matter on to his local MP. The HMO should work towards making reasonable adjustments to his workplace within a timely manner.

13. On 21 August 2015, Dr Kneale, a specialist in occupational health medicine, appointed by HML, provided her opinion on Mr N's injury benefit application. Dr Kneale did not agree that Mr N met the criteria for an injury benefit award and said:-

- An injury benefits award is considered when the applicant has sustained an injury during the course of their employment that was wholly or mainly attributable to the nature of their role, or from an activity reasonably incidental to it.

[1] Remploy is an organisation in the United Kingdom which provides employment placement services for disabled people. It is a major welfare-to-work provider, delivering a range of contracts and employment programmes, for people with substantial barriers to work

- In arriving at her opinion, Dr Kneale considered occupational health reports dated 12 February 2012, 4 September 2012, 29 January 2013, 5 September 2014, 21 April 2015, and 28 April 2015. She reviewed Mr N's sickness absence report, and noted that there were no previous periods of absence that were relevant or in need of consideration.

- Based on the occupational health reports, Mr N's claim was that his pre-existing condition of CFS-ME was exacerbated due to the HMO's inability to comply with reasonable adjustments to his working environment, in line with the Equality Act.

- CFS-ME was a condition characterised by a state of fatigue that persists for more than six months. Her understanding of the Rules was that in order to be eligible for a sick leave excusal award, the cause of the absence had to have a direct causative relationship, while being more than 50% attributable to an index event.

- There was no medical evidence available to demonstrate the exacerbation of Mr N's condition was related to his workplace or an index event. As she understood it, a sick leave excusal award was not covered by the exacerbation of a pre-existing condition, and so Mr N did not meet the criteria for such an award.

14. On 1 October 2015, the HMO partially upheld Mr N's HGR01 grievance from 15 April 2015 and said:-

- There was sufficient evidence that a delay in considering and applying reasonable adjustments to his role contributed to his absence between 2 July 2014 and 6 August 2014. This period would now be treated as disability leave.

- By the time he went on the second period of absence between 16 September 2014 to 19 January 2015, the adjustments were in place. However, the prolonged delay in their implementation was a likely contributory factor in his second period of absence. His current line manager would therefore be given discretion in deciding whether to class the second period of absence as disability leave or not.

- The reasonable adjustments that were now in place, were correct and appropriate. The adjustments implemented would be reviewed as and when he (Mr N) felt they needed to be, in relation to his condition and continued welfare.

- His line manager should maintain regular contact with him to ensure any necessary adjustments were in place.

15. On 7 October 2015, Dr Hampton, Mr N's Consultant Clinical Psychologist, wrote to the HMO to support the implementation of any reasonable adjustments to Mr N's workplace. Dr Hampton explained that:-

- Mr N suffered from CFS-ME and generalised pain. Mr N accepted that he suffers from a chronic condition, requiring constant management, and describes the pain as a constant aching in his joints.

- The symptoms associated with his conditions were: fatigue; post exertion malaise; cognitive difficulties (brain fog); memory problems; sleep disturbance; and musculoskeletal pain of varying intensity.

- Mr N was aware of the complex interactions between the psychological, physical, and social components of his experiences. Living with the symptoms of CFS-ME affects Mr N's mobility, functional processing, and mood. Any perceived increase to external/internal stressors can act to exacerbate the condition and decrease any coping mechanisms that Mr N had developed.

- The self-management strategies that Mr N Incorporated into his everyday lifestyle were:

    - pacing - changing his posture and position frequently;

    - relaxation and mindfulness – techniques used to decrease muscular tension by focusing on his breathing and self-awareness;

    - planning - prioritizing his activities to reduce variation and establish stable daily routines; and

    - communication – sharing any information to establish needs and help resolve/identify stressors while enabling collaborative problem solving.

- Dr Hampton understood that the HMO had adjusted Mr N's working environment which included allowing Mr N to work from home three days a week. To help further address Mr N's workplace needs, it would be helpful if the HMO allowed Mr N to:

    - take regular breaks to change position on a frequent basis, as well as the use of HO's flexi working policy to help Mr N avoid rush hour traffic;

    - provide Mr N with a physical space to practice meditation to help manage physical and psychological stressors;

    - allow Mr N the ability to approach his working days on a flexible basis as opposed to set days; and

    - create a shared plan with specific review dates between Mr N and his manager to reduce the stress of living with any uncertainty.

16. On 12 October 2015, Mr N appealed the HMO's HGR01 response of 1 October 2015 and said:-

- He was refused a copy of a recording of a work meeting that took place on 21 May 2015, which he felt was in breach of the Equality Act. The recordings have since been destroyed.

- A performance development review, for 2014/2015, said that all the suggested reasonable adjustments were completed when he returned to work in August

2014. It was only on 11 August 2014, that a laptop to allow him to work from home was requested, with him receiving the laptop on 9 September 2014. He only started working on 11 September 2014, to the detriment of his own health taking sick leave on 16 September 2014 due to the time taken to implement adjustments for his condition.

- He informed the HMO of what he was, and was not, able to do on 21 October 2014, this included a report from Dr Morris; however, he had yet to receive a response to this. If he was provided with a response, his pre-existing condition might not have been exacerbated due to workplace stress.

- During the grievance process he was told that he was exempt from the personal development review process between 2014/2015. However, in doing this, his contribution to the HMO was missed, despite his work on a system that launched during the same period. During this time, he provided an effective, cost reduced, digitally delivered and customer centric service. This should be recognised with a one-off bonus payment.

- Both periods of his sickness absence from between 2 July 2014 and 19 January 2015 should be classed as disability leave.

17. In January 2016, the HMO wrote to Mr N and explained that based on the SMA's report, his condition (CFS-ME) was not classed as a qualifying injury. Consequently, his injury benefit application was declined.

18. On 2 February 2016, Mr N attended an in-person assessment with Dr Morris, a medical advisor for Care Health Services. Thereafter, Dr Morris drafted a report based on the assessment (**the 2016 OH report**) and said:-

- Mr N was last seen in April 2015; however, it appeared that there had been little improvement in his conditions. During this time, Mr N saw Dr Hampton as part of the Velindre NHS Trusts chronic pain management service. He noted the symptoms detailed in Dr Hampton's report of 7 October 2015. Mr N also suffered from hypersensitivity to light, noise, smells and crowded areas.

- Despite being given a home working contract, backdated to 11 September 2014, Mr N did not feel that he had a defined work role. He enlisted the aid of Access to Work and Remploy; however, neither organisation could help until he had a defined role from the HMO.

- Mr N needed to be placed into a non-target driven role to allow him to work at his own pace. While working from home he was able to do IT work, data processing and statistical analysis.

- It was understood that the question of how often Mr N could attend the office was raised. In line with Dr Hampton's 7 October report, to help facilitate office attendance Mr N needed to be provided with his own quiet space to work, in which he could control the temperature.

19. In drafting the 2016 OH Report, Dr Morris answered a number of questions raised by Mr N and the HMO:-

- Mr N's conditions were unpredictable, for which there had been no real improvement within the last 10 years. In fact, his symptoms appeared to have deteriorated. It was unlikely that there would be any significant improvements in his condition/symptoms between now and his normal retirement age.

- Mr N had said that he applied for three roles within the HMO, none of which were able to meet his required adjustments. So, it was evident that the barrier to Mr N's continued employment was if the suggested adjustments could not be implemented with any role in the HMO.

- It was impossible to say what reasonable adjustments could be implemented within the HMO's attendance management procedure to account for Mr N. This was because Mr N was likely to have an increased numbers of absences when compared to an individual who did not suffer from a chronic condition.

- Mr N would likely only be able to work from home, attending the office only when he felt he was able to. If Mr N was made to attend the office on days on which he felt he was unable to, it would undoubtedly trigger external and internal stressors affecting his CFS-ME. Mr N's continued work related stress was certainly affecting his CFS-ME, this was supported by Dr Hampton's report of 7 October 2015.

- Preferably, Mr N needed to work in an environment that was 23 degrees Celsius with a humidity of 50%. He was able to work outside these conditions, but adhering to them helped him managed his symptoms. Unless Mr N was provided with a personal office space, with controllable environmental factors, it was highly unlikely that he would be able return to the office on a frequent basis, let alone the suggested two days a week.

- It was possible that Mr N might be able to attend the office once, or twice, a month. Though, the significant variability and unpredictability of his symptoms would make regular office attendance unlikely and hard to plan for.

- Mr N wished to record work meetings to allow him to verify the minutes at his own pace. This was due to the cognitive impairment he suffered from. This, in Dr Morris' view, was a reasonable and sensible accommodation for the HMO to make.

- There were certain roles that Mr N would be able to undertake while under a HMO contract. However, if no such roles were available, then consideration could be given to an application for ill health early retirement (**IHER**).

- HO's management should discuss, and outline, what Mr N's defined role was in the HMO, while accommodating his agreed working from home contract. If such a role could be agreed upon, then there was no reason why he could not continue in HO employment into the future. If such a role was unavailable, and that an

improvement in his condition was unlikely in the future, IHER should be considered as a next step.

20. On 10 February 2016, Dr Fox, a Consultant Occupational Physician, for HML, received a copy of the 2016 OH Report. Dr Fox wrote to the HMO and said that having reviewed the 2016 OH Report, he agreed with Dr Morris' analysis, it was clear that Mr N suffered from a highly intrusive and troubling condition. Individuals suffering from symptoms of CFS-ME were inherently unpredictable making it hard to determine whether they could work on any given day. If was for the HMO to decide whether it was able to accept the way in which Mr N could work (home working) while considering the unpredictable nature of his condition. If HO could not implement any of the recommended adjustments, IHER was the next logical step to take.

21. On 14 March 2016, the HMO provided its response to Mr N's HGR01 appeal of 12 October 2015, and said:-

- His personal development review for 2014/2015 was inaccurately recorded due to an oversight, which had been acknowledged and corrected.
- It was satisfied that, following discussions with management, his contribution to the launch of a compliance system, in 2014/2015, formed part of the launch's success.
- The HMO was satisfied that his manager had appropriately applied discretion in deciding whether to award him a bonus.
- Both of his periods of absence from 2 July 2014 to 19 January 2015, were accurately recoded as disability leave.

22. On 24 March 2016, Mr N submitted an appeal against the HMO's decision to decline his injury benefit application. In support of his appeal, Mr N submitted the 2016 OH Report and Dr Fox's report of 10 February 2016.

23. On 7 April 2016, Dr Raynal, a Specialist Occupational Physician, provided her opinion on Mr N's injury benefit appeal. In reaching her opinion, Dr Raynal considered: medical reports from Dr Fox of 7 October 2015 and 11 January 2016; a report from Dr Baksi of 2 November 2015, Mr N's GP; the 2016 OH Report by Dr Morris; and Dr Fox's report of 10 February 2016. Dr Raynal also noted five periods of absence for Mr N between 17 February 2012 and 19 January 2015.

24. Dr Raynal said that her opinion should be read in conjunction with Dr Kneale's report of 21 August 2015. She reviewed the medical evidence considered by Dr Kneale, in addition to the new evidence provided by Mr N and said:-

- She understood that Mr N believed that the HMO had failed to make reasonable adjustments, to accommodate his condition. This included providing a laptop and adjustments to his exposure to noise, smells, heat, and humidity in the office. Mr N believed this failure exacerbated his condition leading to periods of absence.

- She needed to determine whether Mr N suffered an injury during the course of his service that was wholly, or mainly, attributable to his role, or an activity reasonably incidental to it.

- Mr N had suffered from CFS-ME since 2006, the symptoms of which made it difficult for him to cope with his work requirements. Mr N believed that HO management were unsympathetic to his requests for reasonable adjustments to his workplace and work pattern.

- Based on the evidence available, CFS-ME was a multi-causal condition with neuroendocrine, immune, and automatic nervous system factors involved. Symptoms were also linked to internal and external stressors.

- She referred to the Deputy Pensions Ombudsman's (**the DPO**) determination PO-189[2] (**Selfe v SME and MyCSP**). In this Determination, the DPO said that the applicable rules did not provide for an award in respect of the exacerbation of a pre-existing condition unless that condition was mainly attributable to the applicant's work.

- She did not support Mr N's injury benefit appeal as, in her opinion, and on the balance of probabilities, the cause of Mr N's relevant periods of absence was his pre-existing condition, which was not caused by his role.

25. On 1 September 2016, Dr Hampton provided the HMO with an update on Mr N's condition. He (Dr Hampton) spoke with Mr N on 31 August 2016, during a telephone assessment. Mr N's decision to apply for an injury benefit award was due to the HMO's failure to adhere to reasonable adjustments outlined in previous occupational health reports. Subsequently, Mr N's symptoms had been exacerbated, namely debilitating fatigue, cognitive disturbance, hypersensitivity to external and internal stressors. This also impacted his chronic pain. To continue to remain in work, Mr N required the effective and timely implementation of reasonable adjustments.

26. On 20 September 2016, Mr N appealed the decision to decline his application for an injury benefit award and said:-

- He did not believe that Dr Kneale had acted in accordance with the applicable Rules before declining his injury benefit application. Nor did he agree with the comparison made by Dr Raynal between his own application and Selfe v SME and MyCSP. His application made clear that the index incident, which gave rise to the qualifying injury, was the result of delays, caused by the HMO, in implementing reasonable adjustments for his role based on his condition.

- Before he started in his role as a compliance officer, in asylum support, he was able to travel into the office on a fulltime basis. Due to the HMO's inaction, he was now forced to work from home fulltime. This would eventually result in a loss in his earning capacity as, in the future, his condition was likely to decline further. The

[2] Civil Service Injury Benefit Scheme (PO-189) | The Pensions Ombudsman (pensions-ombudsman.org.uk)

HMO had agreed that he was unable to fulfil his role as it was unable to support the reasonable adjustments in the long term.

- His period of absence between 2 July 2014 to 19 January 2015 had been amended from sick leave to disability leave. Consequently, this meant that his CFS-ME had been aggravated wholly, or mainly, by the HMO's actions.

- There were a number of material differences between his own case and that of Selfe v SME and MyCSP.

- Throughout his IHER and injury benefit applications, he had only ever listed the reason for his illness/injury as CFS-ME. In Selfe v SME and MyCSP, the applicant made an application in relation to his knee and then subsequently made a claim for a neck injury as well. Hiis sick leave was reclassed as disability leave, whereas in Selfe v SME and MyCSP, the applicant's absence was only ever in relation to sick leave.

- In reviewing his injury benefit application HML had not requested any additional information or even undertaken an in-person assessment of him, despite him having requested for one.

27. The HMO referred Mr N's IHER application, and his injury benefit appeal onto HML, who appointed Dr Evans to review both the application and appeal.

28. On 20 October 2016, Dr Evans provided his opinion on Mr N's IHER application. Dr Evans said that Mr N's conditions meant that he was incapable of efficiently discharging the duties of his role and that this was likely permanent or at least up until his state pension, or normal retirement date, which ever was later. Consequently, Mr N met the criteria for an upper tier IHER pension.

29. On 3 November 2016, Dr Evans provided his opinion on Mr N's injury benefit appeal. Dr Evan's said that Mr N did not meet the criteria for an injury benefit award. In reaching this decision, Dr Evans said:-

- He understood that the HMO had agreed to class two periods Mr N's sick leave from 2 July 2014 to 6 August 2014 and 16 September 2014 to 19 January 2015 as disability leave. It was unclear whether this should be treated as a relevant consideration. If it was, HO should refer the matter back to HML stating what advice it required.

- The injury benefit appeals procedure related to medically assessed levels of apportionment and impairment of injuries sustained on or after 1 April 2003. In Mr N's case, HML had not previously provided any advice on apportionment of earnings for Mr N. As he (Dr Evans) understood it, he was to review the HMO's decision that Mr N had not sustained a qualifying injury, in accordance with Rule 1.3.

- For brevity, he would not repeat any information that had already been covered by the HMO's decision. However, in short, it was understood that events during Mr N's employment contributed to an increase in the symptoms associated with his CFS-ME condition. That is, the time taken to implement reasonable adjustments which lead to a period of disability absence.

- He reviewed the opinions of his colleagues, Dr Kneale, and Dr Raynal, who declined Mr N's initial application on the basis that his condition pre-dated the events outlined in the application. Dr Raynal had cited Selfe v SME and MyCSP in her initial opinion. He took note of Mr N's comments about the difference between his circumstances and that of Selfe v SME and MyCSP.

- In dealing with previous injury benefit applications, he (Dr Evans), while considering Selfe v SME and MyCSP, the exacerbation of a pre-existing condition fell outside of the scope of the Rules. That is unless the pre-existing condition is at least mainly attributable to the applicant's employment.

- Based on the various medical reports provided, Mr N first developed CFS-ME symptoms in 2006, attributable to a viral infection. It was not possible to conclude that Mr N's CFS-ME was caused by his employment. Even if it was accepted that the exacerbation of his symptoms was work related, this would fall beyond the scope of the Rules.

- That being said, if he (Dr Evans), had misunderstood the Rules, and Selfe v SME and MyCSP, he needed to consider the effect this would have on Mr N's application. So, the exacerbation would need to be mainly caused by work related events. It was likely that Mr N did experience work related stress and that it was linked to the exacerbation of his CFS-ME. However, he was cautious that the nature of CFS-ME was one of relapse and remission.

- It was plausible that Mr N's perception of work-related events that adversely affected his mental wellbeing affected the way in which he perceived his symptoms and how to respond to them. This was, however, insufficient to confirm that a qualifying injury was sustained. This was because:

    - other factors were linked to the exacerbation;

    - CFS-ME may spontaneously follow a relapse/remission course; and

    - knowledge of CFS-ME was incomplete.

- On the balance of probability, it was not possible to conclude that the exacerbation of his CFS-ME symptoms was mainly attributable to his employment. So, even if the exacerbation of a pre-existing condition fell within the scope of the Rules, Mr N would not qualify for an injury benefit award.

30. On 18 November 2016, Mr N left the HMO by way of IHER.

31. On 24 July 2017, Mr N made a complaint under stage one or the Scheme's Internal Dispute Resolution Procedure (**IDRP**) regarding his application for an injury benefit award.

32. On 29 September 2017, MyCSP provided its response under stage one of the IDRP and did not uphold Mr N's appeal. MyCSP said that:-

- As the Scheme administrator, it was for MyCSP to make a decision on whether an individual qualifies for an injury benefit award, under Rule 1.3(i), based on the medical opinion of the SMA. However, decisions as to whether an individual actually had a qualifying injury were made by the HMO, not MyCSP.

- Each Civil Service Department held a separate arrangement for injury benefit applications. The HMO shared service centre processes injury benefit and sick leave excusal (**SLE**) applications. SLE is granted for qualifying injuries/illness while a member is in service, for up to a period of 182 days absence. If agreed, the HMO would pay the member's full pay for any periods of unpaid/reduced pay that were the result of a qualifying injuries/illness.

- Upon receipt of an appeal for an injury benefit award, MyCSP looks at whether, or not, the correct process was followed during the assessment of the initial injury benefit application. Under IDRP, MyCSP is unable to overturn, or question, the SMA's evaluation of medical evidence that was submitted, it can only ensure that it was considered.

- It understood that part of Mr N's appeal was that he had not received a response from MyCSP regarding the outcome of his injury benefit application. MyCSP would only contact him if his application was successful, and if the HMO had instructed it to calculate and pay the relevant award.

- Temporary awards were granted for qualifying injuries if SLE was exhausted, after 182 days, and the applicant had a period of half/nil pay. Permanent awards are granted for qualifying injuries after the applicant has left service. Both temporary and permanent applications had to be made via the HMO and can only be awarded if the original injury/illness was found to be qualifying. If his initial injury benefits application was non-qualifying, then he was not eligible for a temporary or permanent award.

- Before the HMO could make a decision on whether a member qualified for an injury benefit award, the opinion of the SMA needed to be obtained. The HMO received his injury benefit application on 11 March 2015. Thereafter, Mr N requested a meeting was set up between his union representative and the HMO. On 12 June 2015, the HMO forwarded his application onto Capita Health and Wellbeing (the previous SMA) to review. Dr Kneale was appointed as the SMA in charge of reviewing his application.

- Dr Kneale provided her view on 21 August 2015 and said:

> "it is my medical opinion that in this case there is no medical evidence to suggest that [Mr N's] chronic fatigue syndrome was in fact caused by his workplace. […] it is my medical opinion that [Mr N] does not fulfil the criteria for [SLE]."

- Dr Kneale also explained that a face-to-face assessment was not required as she was satisfied that she held enough information to form an opinion on his application. She also did not require any further medical reports from his chronic fatigue syndrome consultant.

- It was understood that Mr N brought a complaint against Dr Kneale as he believed she had disregarded a report from an Occupational Health Physician. This report explained that Mr N's condition was pre-existing and aggravated by his employment. The response to this complaint was that Dr Kneale had taken into account all of the medial evidence available.

- Selfe v SME and MyCSP concluded that the Rules did not provide for an award in respect of an exacerbation of a pre-existing condition unless the condition was mainly attributable to the members work. This approach was applied by Dr Raynal in reviewing his injury benefit appeal.

- Based on Dr Evans' report of 3 November 2016, the HMO concluded that Mr N was not eligible for an injury benefit award, as his injury was not deemed to be qualifying. Based on the evidence available, MyCSP was satisfied that the HMO had processed his injury benefit application in accordance with the Rules. So, he (Mr N) was not entitled to an injury benefit award, nor any interest, or any compensation.

33. Mr N did not accept my CSP's stage one IDRP response and asked for his complaint to be investigated under stage two of the IDRP. He said that:-

- The HMO had accepted that it did not implement reasonable adjustments within a reasonable timeframe, which lead to the exacerbation of his condition. This resulted in him being unable to work, resulting in a total loss of earnings. Dr Evans agreed that he met the permanent IHER criteria, but he was not eligible for an injury benefit award.

- Selfe v SME and MyCSP should not have had any bearing on the review of his injury benefit application. The SMA had incorrectly said that pre-existing medical conditions are not covered by the Rules. A grievance raised about two periods of absence was successfully overturned when the periods of absence were amended to disability leave, due to the HMO's inability to make reasonable adjustments to his workplace.

- His injury benefit application needed to be assessed, and paid to him, in line with the Rules, with interest. He should also receive compensation in recognition of the time and stress pursuing his injury benefit application has caused him.

34. On 22 October 2018, the CO provided its response under stage two of the IDRP and upheld Mr N's complaint. It explained that:-

- There were a number of inaccuracies in MyCSP's stage one IDRP response. In particular, it said that it was for MyCSP and the HMO to determine whether or not Mr N's injury qualified under Rule 1.3(i), based on the opinion of the SMA. So, MyCSP had provided conflicting information.

- The HMO had delegated authority to determine if an application for SLE was qualifying. However, it did not have the necessary authority to determine if an injury was qualifying under the Scheme. This was for MyCSP to determine. MyCSP's role began when an individual, who claimed to have suffered a qualifying injury, reached reduced/nil sick pay, or had left employment.

- It was incorrect for MyCSP to say that it was unable to overturn an SMA's opinion or question the SMA's evaluation of any submitted medical evidence. It was MyCSP's duty to refer matters back to the SMA for clarification or to challenge points of concern. MyCSP could also decide not to accept the SMA's opinion, or any medical evidence submitted. All that was required was that MyCSP must consider any information as part of its assessment.

- The SMA noted that Mr N was diagnosed with CFS-ME in 2006 and did not agree that this condition qualified under Rule 1.3(1) as it was not "wholly or mainly" attributable to his role. The SMA did not agree that his condition would have been accepted as qualifying injury when he was originally diagnosed. Even if the Rules contained a provision for the exacerbation of a pre-existing condition, his application would have been declined as the injury was non-qualifying.

- The SMA did not agree that the exacerbation of Mr N's condition was attributable to his participation in work events. This was because his injury was the result of the exacerbation of a pre-existing condition.

- It was the CO's view, based on the evidence available, that the SMA had correctly followed due process, reasonably assessed his injury benefit application based on the questions asked. However, it did not agree that the HMO or MyCSP had followed the correct process in reviewing his application. This was because it appeared the HMO had made the decision on whether Mr N's injury was qualifying when it should have been MyCSP.

- It instructed MyCSP to refer Mr N's injury benefit application back to the SMA to reconsider and provide a new report (**the Reconsidered Report**). MyCSP needed to ask the SMA whether Mr N's injury met the criteria set in the Rules for qualifying, and to assess the level of earnings impairment. Thereafter, MyCSP needed to make a decision whether Mr N was eligible for an injury benefit award.

35. Between 22 October 2018 and 27 August 2020, MyCSP and the SMA corresponded with each other as they were unsure as to why Mr N's injury benefits application needed to be reconsidered.

36. On 27 August 2020, MyCSP referred Mr N's injury benefit application onto HML to appoint a new SMA to reconsider.

37. Between October 2020 and November 2020, MyCSP, the new SMA and Mr N corresponded with one another requesting the necessary consent from Mr N for the SMA to request information from Mr N's occupational health record.

38. On 11 February 2021, the SMA sent Mr N a copy of his/her Reconsidered Report. The SMA required Mr N's consent before a copy of the report could be forwarded to MyCSP.

39. Between February 2021 and July 2021, MyCSP sent a number of emails to the SMA to follow up on the Reconsidered Report.

40. On 9 July 2021, the SMA informed MyCSP that Mr N had not provided his consent for the Reconsidered Report to be released.

41. On 12 August 2021, the SMA told MyCSP that Mr N had withdrawn his consent for the Reconsidered Report to be sent to MyCSP.

42. On 17 August 2021, MyCSP closed Mr N's injury benefit application.

43. Following the complaint being referred to The Pensions Ombudsman, Mr N and the CO, made further submissions that have been summarised below.

44. Mr N said:-

- The CO and MyCSP had inferred that he was withholding his consent for the SMA to issue the Reconsidered Report to MyCSP. It was misleading for each party to infer this. He raised a new complaint with MyCSP, the CO and the SMA on 9 September 2021, to which he wanted a response before he consented to the SMA sharing the Reconsidered Report.

- There were numerous exchanges of information between himself, MyCSP and the SMA in 2021. He believed that pivotal information was not provided to the SMA in the consideration of his injury benefit application. Namely, an accident record report dated 15 March 2010, which did not appear to have been included within his injury benefit application.

- Given the amount of time that had passed since 2016, a new occupational health report should have been requested by MyCSP taking into account his current condition.

- He did not believe that the correct questions had been asked of the SMA during the injury benefits application process. His injury benefit application was in part due to the time taken to implement reasonable adjustments which caused his condition to decline, this was not only down to stress.

45. The CO made further submissions that have been summarised below:-

- The decision to remit Mr N's injury benefit application back to MyCSP, and latterly the SMA, was because the HMO made the initial decision about whether Mr N's injury was not qualifying. The application was for a permanent injury benefit, so it was for MyCSP, not the HMO, to decide whether Mr N's injury was qualifying, under the Rules.

- The CO wanted to ensure that the SMA had taken into consideration the Court of Appeal decision regarding *Young v NHS Business Service Authority*[3].

- After it issued its stage two IDRP response to MyCSP, there was some confusion between MyCSP and the SMA as to why Mr N's injury benefit application needed to be reconsidered. Between October 2018 and August 2020, MyCSP and the SMA sought to resolve this confusion, albeit without any success. Eventually, MyCSP and the SMA referred back to the CO for clarification on the matter.

- On 27 August 2020, MyCSP referred Mr N's injury benefit application back to the SMA to reconsider and asked the SMA to consider the application on the basis of:

  > "Would [Mr N's] earning capacity have been impaired by the [CFS-ME] even without the stress which he alleged had exacerbated his condition."

- To answer this question, the SMA requested additional medical evidence, and sight of Mr N's occupational health records. The SMA's Reconsidered Report was provided to Mr N on 11 February 2021. However, on 26 March 2021, the SMA informed MyCSP that Mr N would not provide his consent for the Reconsidered Report to be sent to MyCSP as he had requested additional documentation.

- Neither MyCSP, nor the CO have had sight of the SMA's Reconsidered Report, so a decision had not been made regarding Mr N's injury benefit application.

- The CO recognised that there had been significant delays between October 2018 and August 2020 in reconsidering Mr N's injury benefit application. In recognition of this, Mr N was offered £250 from MyCSP, and £250 from the CO, on behalf of the SMA. However, even if the confusion between MyCSP and the SMA was clarified earlier, the situation would likely remain unchanged as Mr N would likely still not have provided his consent for the SMA to share the Reconsidered Report.

[3] *Young v NHS Business Authority* | [2015] EWHC 2686 (Ch) | England and Wales High Court (Chancery Division) | Judgment | Law | CaseMine

Adjudicator's Opinion

46. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by the HMO and MyCSP. The Adjudicator's findings are summarised in paragraphs 47 to 65:-

47. To qualify for an injury benefit under Rule 1.3, Mr N must have suffered an injury in the course of official duty, which is wholly or mainly attributable to the nature of the duty; or contracted a disease to which he was exposed wholly or mainly by the nature of his duty. The decision as to whether Mr N satisfied the criteria under Rule 1.3 was for MyCSP (on behalf of the Minister) to make initially, and the CO on appeal.

48. Rule 1.3 does not specifically require MyCSP and/or the CO to refer an injury benefit application to the SMA in order to decide whether the applicant satisfied the criteria set out in that rule. Whereas the SMA's assessment of the impairment of the applicant's earning capacity is specifically called for under Rule 1.6. However, a decision must be made as to whether the applicant satisfies the criteria under Rule 1.3 before the case can proceed to consideration under Rule 1.6.

49. Mr N's injury benefit application was originally considered by Dr Kneale on 21 August 2015. Dr Kneale did not agree that Mr N met the criteria for an injury benefit award, or an SLE award, as the Rules did not cover the exacerbation of a pre-existing condition. On appeal, the matter was considered by Dr Raynal, who provided a report dated 3 November 2016, which agreed with Dr Kneale's opinion. In support of her opinion, Dr Raynal referred to Determination PO-189, in which the then DPO stated:

> "Regulation 1.3(i) requires the medical condition to be "wholly or mainly" attributable to "the nature of the duty". It does not provide for the exacerbation of a medical condition unless those criteria are met. For the reasons set out above, therefore, I do not consider that the decision not to grant him an injury award is perverse because I consider that there was insufficient evidence to suggest that his medical condition was caused wholly or mainly by the nature of his duty."

50. Mr N strongly disputed the relevance of Determination Selfe v SME and MyCSP, with regard to his own circumstance and injury benefit application, subsequently appealing the decision to decline his injury benefit application. Mr N's appeal was assessed by Dr Evans who agreed with the opinions of the previous SMA's. Dr Evans believed that Selfe v SME and MyCSP made clear that the Rules did not provide for the exacerbation of a pre-existing condition to be considered as a qualifying injury. That was unless the exacerbation met the criteria of "wholly" or "mainly attributable" to his role, or activities incidental to his role.

51. Dr Evans noted that, from Mr N's occupational health records, the cause of his (Mr N's) CFS-ME related to a viral infection in 2006. This, in Dr Evans' view, was not an unreasonable conclusion. He did not believe that it was possible to conclude that Mr N's CFS-ME arose as a direct result of his employment or events that transpired during his employment.

52. Dr Evans surmised that it was possible that Mr N's perception of work-related events was, in part, attributable to the decline in his mental wellbeing which thereby affected his perception of the CFS-ME related symptoms. It was not possible to conclude that the exacerbation of Mr N's pre-existing condition was wholly or mainly attributable to the described work events. This was because, there were other factors linked to the exacerbation of Mr N's symptoms, and the condition was prone to spontaneously follow a relapsing/remitting course, and the current knowledge of CFS-ME was incomplete.

53. The Adjudicator was satisfied that each SMA had understood and had acted in accordance with the Rules, particularly Rule 1.3, and had addressed the correct question, applicable at the time. That was, did Mr N sustain a qualifying injury that was wholly or mainly attributable to his role, or its associated duties. Each SMA considered that Mr N had not sustained such an injury, as his condition was pre-existing.

54. In arriving at this view, the Adjudicator noted and considered that *Young v NHS BSA* had widened the scope of the questions that were required under injury benefits applications. However, the judgment was effective from 17 January 2017 and did not take retrospective effect. Overall, it was not unreasonable for the SMAs to arrive at the outcome that they did, that is that Mr N did not sustain a qualifying injury under Rule 1.3. Consequently, there was no requirement to consider Mr N's application against Rule 1.6.

55. Upon receipt of Dr Evan's report, the decision regarding Mr N's injury benefits application was incorrectly referred from MyCSP to HO to make. Decisions regarding Rule 1.3 were for MyCSP to make, on behalf of the Minister, not HO. HO was only permitted to provide a decision as to whether Mr N qualified for SLE, while he remained in its service. Consequently, the HMO overstepped its role within the injury benefits process, a role which it should have been aware of given the guidance available to it.

56. The Adjudicator took the view that, MyCSP and the HMO had erred in their approach to the Scheme's injury benefit procedure. Further, it did not appear that the HMO informed Mr N that his injury benefit application, on appeal, was declined. It appeared that Mr N was only made aware of this when he was provided with a copy of Dr Evans' report in November 2016. This meant that Mr N was not properly informed to appeal the HMO's decision to decline his application, as he was unaware of the reason for the application being declined, apart from the view expressed by Dr Evans.

57. The actions of both MyCSP and the HMO amounted to maladministration. As maladministration had been identified the next step would be to return Mr N to the position that he would have been in, but for the errors identified.

58. Under stage two of the IDRP, the CO correctly identified the errors in the decision-making process and referred the matter back to MyCSP, and the SMA, to make a decision on whether Mr N sustained a qualifying injury. Consequently, Mr N was

returned to the correct position as the procedural errors were identified and the necessary corrective actions were taken.

59. Between 22 October 2018 and 27 August 2020, there was a delay in MyCSP and the SMA reconsidering Mr N's initial injury benefit application. The CO explained the delay occurred as neither MyCSP, nor the SMA, understood why Mr N's injury benefit application had been referred for reconsideration. The CO added that MyCSP and the SMA corresponded with each other to solve the issue; however, the matter was referred to the CO for clarification.

60. While the Adjudicator understood the reason for the delay, a period of 1 year and 10 months was an unacceptable amount of time for MyCSP, and the SMA, to adhere to the CO's directions, for a relatively straight forward matter. If there was any confusion between MyCSP and the SMA about what was required after the stage two IDRP, MyCSP should have sought clarification from the CO much sooner than it did. MyCSP's inaction for the period amounted to maladministration causing Mr N distress and inconvenience during an already difficult time in his life.

61. The Reconsidered Report was sent to Mr N, on 11 February 2021, however, Mr N did not provide his consent for it to be released by the SMA to MyCSP for review. Mr N did not wish to provide his consent until a complaint he submitted on 9 September 2021, against the SMA, was answered. MyCSP then closed Mr N's injury benefit application on 12 August 2021 as it had not received the Reconsidered Report. By not providing his consent, Mr N delayed the consideration of his injury benefit application. The Adjudicator suggested that Mr N should consent to the SMA releasing the Reconsidered Report to MyCSP, so that it might reconsider his injury benefits application.

62. MyCSP's closure of Mr N's injury benefit application amounted to maladministration, as it did not fulfil the requirements to make a decision under Rule 1.3. However, this did not result in any injustice as Mr N was in the same position he would have been in if MyCSP had declined his application, as he would not have provided his consent for the Reconsidered Report to be released.

63. Mr N's dispute related to the handling of his injury benefit application from March 2015. The only evidence that was applicable in reviewing his application was evidence that would have been available at that time, or anything that provided further insight into his condition at the time of the application. There was no requirement for MyCSP or the SMA to request current medical evidence during the reconsideration of Mr N's injury benefit application.

64. The severe delays that Mr N had encountered in having his injury benefit application reconsidered, likely compounded any distress and inconvenience Mr N suffered due to the initial procedural errors and closure of his application. Though it was noted that after the Reconsidered Report was completed, Mr N was responsible for any delays thereafter.

65. The CO, the HMO and MyCSP appeared to have given little consideration as to how their errors/delays would have affected Mr N's condition and his mental wellbeing. The CO had offered £500 to Mr N in recognition of the delays. The Adjudicator did not agree that the offer adequately recognised the severe distress and inconvenience Mr N had suffered. The Adjudicator recommend that £2,000 should be paid to Mr N split between the HMO and MyCSP.

66. Mr N accepted the Adjudicator's opinion; however, he queried whether his injury benefit application would be reopened, as opposed to a new application, if he gave his consent for the Reconsidered Report to be released to MyCSP.

67. The HMO accepted the Adjudicator's opinion and did not provide any additional comments. The HMO agreed to pay Mr N £500, in accordance with the Adjudicator's recommendation, due to the errors it was responsible for.

68. MyCSP accepted the Adjudicator's opinion, in part; however, it did not agree that a payment of £1,500 was warranted. MyCSP suggested that a payment of £1,000 was sufficient, this was in addition to the £500 that the HMO had agreed to pay Mr N. MyCSP provided its additional comments, outlining a different timeline of events, which did not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by MyCSP which are summarised below:-

- MyCSP accepted that it was responsible for delays between; 7 March 2017 to 17 May 2017 (71 days); 29 September 2017 to 17 July 2018 (291 days); and 20 December 2019 to 6 August 2020 (211 days). In total 572 days.

- The SMA was responsible for delays amounting to 444 days, and the CO was responsible for delays of 98 days in responding to Mr N stage two IDRP complaint.

- Out of the total delays, 1269 days, MyCSP was responsible for less than 45%. It believed an award of £1,000 was sufficient as opposed to £1,500.

- If Mr N provided his consent for the SMA to release the Reconsidered Report, it would reopen his original injury benefit application.

Ombudsman's decision

69. I agree with the Adjudicator that there were instances of maladministration on the part of the HMO and MyCSP. Namely:

- The HMO incorrectly made the decision regarding Mr N's injury benefit application, when the decision should have been made by MyCSP in line with the Rules; and

- MyCSP provided incorrect information within its stage one IDRP response, failed to notice the procedural error in the HMO reviewing Mr N's application; and

delayed the reconsideration of Mr N's injury benefit application, which it closed without making a decision as required by the Rules.

70. The procedural errors in reviewing Mr N's injury benefits application were eventually spotted under stage two of the IDRP by the CO. Thereafter remedial steps were taken to ensure that the application was reviewed, in accordance with Rule 1.3, thereby correcting the procedural errors.

71. If Mr N now wishes MyCSP to proceed with reopening his injury benefit application to reconsider, he should provide his consent to the SMA for the Reconsidered Report to be released to MyCSP.

72. I note that the HMO has agreed to pay Mr N £500; however, MyCSP has not agreed to pay Mr N £1,500.

73. MyCSP accepts it is responsible for 572 days' worth of delays out of an identified period of 1269 days. However, given the number of errors that MyCSP was responsible for, in particular, its failure to notice the HMO's procedural error in reviewing Mr N's injury benefit application, it should be recognised how these errors caused needless distress and inconvenience during an already difficult period in Mr N's life.

74. I agree with the Adjudicator that a total payment of £2,000 to Mr N is merited and, of this sum, the HMO shall pay Mr N £500 and MyCSP £1,500.

75. I partly uphold Mr N's complaint.

Directions

76. Within 28 days of the date of this Determination, the HMO and MyCSP shall respectively pay Mr N £500 and £1,500 in recognition of the distress and inconvenience caused.

Dominic Harris
Pensions Ombudsman

19 September 2024