PO-8837

Ombudsman's Determination

Applicant	Mr E
Scheme	Principal Civil Service Pension Scheme
Respondents	Cabinet Office, MyCSP

Outcome

1. Mr E's complaint is upheld and to put matters right the Cabinet Office should review their 2012 decision to backdate his revised award to 2008. They shall also pay him £500 for distress and inconvenience.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr E has complained that he has not been awarded level 1 injury benefits backdated to January 1997.

Background information, including submissions from the parties

Background

4. Mr E was employed in the Prison Service from 1973 until he retired in January 1997. He was awarded injury benefits at the "Impairment" level (see below). He has appealed this decision on a number of occasions since.

5. In 2010, Mr E's injury benefit was upgraded to "Material Impairment", backdated to November 2008 (the date of his most recent application for reassessment). This opinion concerns the decision to backdate Mr E's revised award to November 2008.

6. Before October 2002, injury benefit provisions were contained in section 11 of the Principal Civil Service Pension Scheme (**PCSPS**) rules. Mr E's injury occurred before 2002 and section 11 applies. Rule 11.3 provided,

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

(i) who suffers an injury in the course of official duty, provided that such injury is directly attributable to the nature of the duty or arises from an activity reasonably incidental to the duty; or

(ii) who suffers an injury 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 this section applies …"

7. Mr E's injury also occurred before the 1997 amendment to rule 11.3(i) which changed "directly" to "solely".

8. The scale of benefits is set out in rule 11.7. It provides for a guaranteed minimum income, which is a proportion of pensionable pay depending upon length of reckonable service and impairment of earning capacity. There are four levels of impairment: Slight Impairment (more than 10% impaired but not more than 25%); Impairment (more than 25% impaired but not more than 50%); Material Impairment (more than 50% but not more than 75%); and Total Impairment (more than 75% impaired). In Mr E's case[1], the guaranteed minimum income for Impairment is 70%; for Material Impairment it is 80%; and for Total Impairment it is 85%.

9. An annual allowance is calculated by subtracting any occupational pension paid from public funds and any specified national insurance benefits from the guaranteed income. The relevant national insurance benefits are specified in rule 11.8 as,

> "the annuity value or the annual value, as appropriate, of any rights which have accrued or probably will accrue from the injury by way of industrial injury benefit, industrial disablement benefit, …"

10. Rule 11.10 provides for review of an award if (amongst other things) the beneficiary's condition deteriorates and he appeals or there is a change in the class of benefit payable under the Social Security Acts.

11. Mr E was awarded an injury benefit in respect of impaired mental health resulting from attendance at prison riots in 1983 and 1990, and a dispute with the Prison Service from 1993 concerning a transferred prisoner. He first requested a review of the level of his award in October 1997. According to the Cabinet Office, he made his request on the basis that his condition had worsened because: he had been investigated for fraud by the Department of Social Security; and attempts to find employment had indicated that employers would not employ him because of his medical history. In October 1999, in support of his request, Mr E provided a report from his psychologist.

12. Mr E's case was referred to the SMA. The SMA confirmed the earlier assessment of Impairment. The Prison Service wrote to Mr E, on 22 February 2000, informing him that, having reviewed evidence provided by the psychologist, the SMA were unable to increase his level of impairment. They gave the following reasons: section 11 awards

[1] As a prison officer, Mr E's reckonable service counts as double after 20 years.

were made on the basis of "loss of earnings directly or solely related to work"; they were based on an assessment of an individual's condition at the time of retirement and post-retirement incidents/events had no bearing; on the basis of the available information, including the psychologist's prognosis, the SMA had concurred with the initial assessment.

13. A further review was undertaken in 2001. Mr E provided a psychiatrist's report dated 24 August 2000 and a psychologist's report dated 15 January 2001. The SMA confirmed the earlier assessment. The Prison Service wrote to Mr E, on 9 May 2001, informing him that, having reviewed evidence provided by the psychiatrist, the SMA were unable to increase his level of impairment. They gave the following reasons: section 11 awards were made on the basis of "loss of earnings directly (or solely) related to work duties"; they were based on an assessment of an individual's condition at the time of retirement and post-retirement incidents/events had no bearing; the SMA did not think Mr E's condition had deteriorated since 1997 and had noted that the psychiatrist thought it had ameliorated a little; the SMA had noted Mr E's symptoms had worsened as a result of the alleged negligence on the part of his solicitors.

14. There appear to have been further referrals to the SMA subsequently.

15. In 2003, the Cabinet Office issued a stage two decision under the internal dispute resolution (**IDR**) procedure. They declined Mr E's appeal on the basis that the evidence indicated that there were other factors which contributed to and perpetuated his condition which were not directly connected with his duties. They identified Mr E's reaction to perceived lack of support from various organisations and premorbid risk factors in his family history and personality.

16. Mr E appears to have made further unsuccessful appeals in subsequent years.

17. Mr E's case was reviewed again in 2009. The SMA (Dr Evans) provided a report, on 27 October 2009, concluding Mr E's impairment of earning capacity lay in the 50-75% range. Summaries of selected medical evidence are provided in an appendix to this document. As a result of Dr Evans' report, Mr E's injury benefit was revised to the Material Impairment level with effect from October 2009.

18. The PCSPS administrators had sought advice from the SMA as to the appropriate date for uplifting Mr E's benefit. In his response, Dr Stuckey referred to the previous reviews and noted that Mr E's benefit had been maintained at Impairment level until the recent assessment. He said the evidence submitted by Mr E (a GP's report dated 8 July 2008) had been insufficient for his colleagues to review his case and a consultation had been required. He said this had taken place in October 2009. Dr Stuckey commented that at any one time there might be an expectation for improvement in a person's condition, whilst at a later date this might not be the case. He suggested Mr E's benefit should be revised from the date of his most recent request for review. The administrators wrote to Mr E confirming that his award would be uplifted with effect from the date of Dr Evans' report.

19. Mr E appealed. He expressed the view that his award should be at the Total Impairment level and backdated to October 1997 (the date of his original appeal). In subsequent correspondence, Mr E argued that, over the past 14 years, his doctors had agreed that he was suffering from Post Traumatic Stress Disorder (**PTSD**) and depression as a result of his work and he was not fit to undertake any work. A stage one IDR decision was issued by the scheme administrators. They said a Total Impairment award had not been made because there was evidence that non-work related factors had contributed to Mr E's condition.

20. Mr E appealed further. The Cabinet Office issued a stage two IDR decision in June 2012. Their findings are summarised below.

    - It is the SMA's responsibility to assess impairment. They referred to rule 1.13j of the PCSPS rules which defines the SMA as the person or body appointed by the Minister to provide a consultation service on medical matters in relation to (amongst other things) injury benefit arrangements.

    - They cannot overrule the SMA's decision but they must be satisfied that the SMA followed due process; that is, they considered all of the relevant evidence and did not come to a perverse decision.

    - The SMA's assessment takes account of the prospects for functional improvement and increased earning ability. This includes the likelihood of spontaneous improvement and the effect of treatment.

    - The SMA's assessment can only take account of the impairment of earning capacity resulting from the relevant injury. It cannot include the effects of pre-morbid risk factors or post-employment factors. In Mr E's case, the evidence had referred to both. It was reasonable to take these into account

    - Mr E had argued that the previous assessments had been overly optimistic. However, Mr E had been in his mid-forties in 1997 and it was possible he might have been capable of some work at some time in the future. He had not provided any medical evidence to contradict that view. In 2009, the medical evidence indicated that a spontaneous improvement in his condition was now unlikely and it had become increasingly unlikely that he would return to the workplace. This was not the case in 1997. It would not be reasonable to backdate his revised award to 1997.

    - The SMA had suggested the revised award should be backdated to the date of Mr E's most recent request for review; November 2008. The administrators appeared to have disregarded this. His revised award should be backdated to November 2008.

    - There was no scope within the rules to apportion Mr E's Incapacity Benefit between that which related to his injury and that which related to other factors.

The calculation of an injury takes account of the annual value of his Incapacity Benefit.

- Mr E's IIDB related to the 1983 riot and, therefore, to his injury. The rules did not state that only IIDB awarded after an injury benefit award should be deducted. Rule 11.8 referred to "any rights which have accrued or probably will accrue from the injury". A letter from a disablement centre referred to IIDB "in respect of" the 1983 riot.

Mr E's submissions

21. The key points from Mr E's submissions are summarised below.

- Mr E says he only had one face to face consultation with a Scheme Medical Adviser (**SMA**) over the course of his appeals. He says, when he requested copies of the report from the SMA (Dr Walsh) he did see, he was told it had been lost. Mr E says the SMA he saw agreed that he was 100% disabled as a result of incidents at work, which would qualify him for a level 1 award. He believes another SMA interfered with this decision and lowered his disablement level to 50%; thereby reducing his benefit to level 2. Mr E says he was provided with Dr Walsh's notes but these were dictated over 12 months after the consultation. He believes a report must have been produced at the time of the consultation because Dr Evans referred to it in his report of 27 October 2009. Mr E says he has been in touch with Atos and Capita in an attempt to obtain copies of medical reports and has been told they cannot be located. He considers Dr Walsh's notes to contain interesting facts about his condition and, in particular, the pre-morbid factors (see appendix).

- Mr E says he was given no explanation for the original level of award; nor was he informed of any appeal process. He says he was told there was no appeal in 1997 and that his award would only be reviewed if he could provide new medical evidence.

- He also says that he was told that the condition had to be solely related to his employment. Mr E says this test has subsequently been found to have been applied illegally. He cites court cases relating to compensation for the Armed Forces. Mr E is of the view that his award should be reviewed by reference to the amended definition.

- Mr E says it was not until 2003 that he was made aware of the Pensions Ombudsman. He has explained that this time coincided with the anniversary of one of the riots and his psychologist leaving his job. He has explained that this was a difficult time for him and he decided to leave his appeal until he felt ready for it. Mr E has explained that he suffered a further setback in 2005, when he was turned down for a job on the grounds of his PTSD. He contacted the Pensions Advisory Service (**TPAS**) in 2006 and submitted a further appeal

in September 2008. He points out that it was not until October 2009 that he was sent to see the SMA and 2012 before a stage two decision was issued.

- Mr E has explained that trying to deal with his complaint has a detrimental effect on his health and he is only able to engage with it when his health permits.

- Mr E says he has provided copies of reports dating from 1994 to 2008. He argues that he should not be penalised if the SMA has lost these reports. He does not agree that time limits should apply to the extent to which his case can be reviewed. Mr E is of the view that no report was provided by an SMA in 1997 and he was simply given a "normal level" of award.

- Mr E points out that he has never recovered sufficiently to return to work and his condition is as bad as it was when his employment ceased. He argues that this proves that the initial assessment was incorrect.

- Mr E says he has no confidence in the medical advisers used by MyCSP. He would prefer an independent doctor sees him and prepares a report without referring it to the Scheme medical advisers.

- Mr E has also raised the fact that his Industrial Injuries Disablement Benefit (**IIDB**) and Employment and Support Allowance (**ESA**) are taken into account. He points out that his IIDB dates from 1983; some 14 years before his retirement. He argues that, had he not been retired, he would have continued to receive this benefit in addition to his salary.

- Mr E has referred to correspondence with his employer, in February 1994, relating to sickness absence. He points out that sickness absence taken between 4 and 19 December 1993, and 17 and 31 January 1994, was excused as directly attributable to incidents in 1983 and 1988; however, absence due to nasal surgery was not excused. He argues that, on this basis, all his Incapacity Benefit from 1997 should be discounted. As an alternative, he argues the amount taken into account should be proportioned in the same way as his level of impairment has been; that is, between 50 and 75% or between 25 and 50%.

- Mr E has asked that the Ombudsman consider whether the Scheme rules operate against natural justice and, if so, how they should be amended.

The Cabinet Office's submission

22. The Cabinet Office's submission is summarised below.

- Mr E's complaint is outside the three year time limit for applying to the Ombudsman. He is not appealing against the decision to backdate his award to November 2008; he is appealing against the earlier decision not to backdate it to 2007 [*sic*].

- In 2010, the SMA had advised that Mr E had, on several occasions, asked for his level of impairment to be reassessed and each review had maintained the original level of impairment. Mr E had provided fresh evidence in 2008 which had been insufficient for the medical adviser to make an assessment without a consultation with an occupational health physician. This took place in 2009. Following this consultation, the level of impairment was increased. Therefore, it had not been until 2009 that there had been sufficient evidence to increase the level of impairment. Natural justice had suggested the revised level of impairment should be backdated to the date Mr E had applied for reassessment; November 2008.

Adjudicator's Opinion

23. Mr E's complaint was considered by one of our Adjudicators who concluded that further action was required by the Cabinet Office. The Adjudicator's findings are summarised briefly below:

    - Time limits applied which restricted the investigation of Mr E's complaint to the decision, concluded in 2012, to backdate his award to November 2008.

    - The decision reached in 2012 relied heavily on an assumption that decisions made in relation to previous reviews had been correct. The evidence indicated that this was not the case and, therefore, this undermined the extent to which the Cabinet Office should have relied on the subsequent SMA's opinion. In particular, Dr Evans had said he had no grounds to alter Dr Sheard's assessment of the effect of pre-morbid and post-employment factors.

    - The evidence indicated that the decision to backdate Mr E's revised benefit to 2008 had not been taken in a proper manner and should be reviewed. It was not possible to say with any certainty that Mr E was in receipt of the correct level of injury benefit or that it had been paid at the correct level from the right date.

    - However, Mr E would have to accept that there was a limit to how far back a review could be expected to look. The Cabinet Office could not now be asked to look back further than Dr Sheard's report in 2003.

    - Rule 11.8 refers to "the annuity value or the annual value, as appropriate, of any rights which have accrued or probably will accrue **from** the injury by way of industrial injury benefit, industrial disablement benefit, …" (emphasis added). Mr E is in receipt of IIDB (and now ESA) as a result of the injury he received in 1983. His benefits accrue **from** his injury and, therefore, must be taken into account under rule 11.7.

24. Mr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr E provided his further comments which do not change the outcome. I

agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr E for completeness.

Ombudsman's decision

25. Mr E has expressed the view that any review of his injury benefit should not be constrained by the usual time limits. His grounds for saying this are his health and that he was not aware of the Pensions Ombudsman prior to 2003. I am not unsympathetic to Mr E's health problems and it has undoubtedly been difficult for him to put together his many appeals. However, he clearly was aware of the option to seek assistance from TPAS and/or progress his case to the Ombudsman from, at least, 2003. He chose not to do so but to submit a further appeal in 2008. The time limits are there for the very good reason that the greater the elapse of time, the harder it becomes to gather the necessary evidence to come to a safe and proper decision. If Mr E was in the position to reengage with his case in 2006 (and to contact TPAS), he could have approached the Ombudsman at that point. He must now accept that his decision not to do so imposes some constraints on the review of his injury award now.

26. I note Mr E's reference to Dr Walsh's notes. However, I do not propose to consider them in any detail because the need for a further review of his award has already been established by reference to other evidence.

27. Mr E has questioned the eligibility test which applies in his case. Mr E's injury occurred before the 2002 establishment of a separate injury benefits scheme. Section 11 of the PCSPS rules applies. His injury also occurred before the 1997 amendment to rule 11.3(i) which changed "directly" to "solely". At the relevant time, rule 11.3 referred to an injury which "is directly attributable to the nature of the duty or arises from an activity reasonably incidental to the duty". This is the eligibility test which applies. I note Mr E's references to amendments to definitions elsewhere but these do not help his case. For the avoidance of doubt, unless the operation of the rules is in breach of overriding legislation, I must apply them as they stand at the relevant time. It is not my role to suggest amending the rules.

28. Mr E has expressed a lack of confidence in the medical advisers used by MyCSP. He would prefer to see an independent doctor and have him prepare a report without reference to the Scheme medical advisers. Whilst I can understand Mr E's concern, given the history of his case, I do not find that there are grounds for excluding the SMA from a future review.

29. I turn now to the question of the degree to which Mr E's national insurance benefits should be taken into account in accordance with rule 11.7. Rule 11.7 provides for the amount of injury award to be "the amount which when added to … any of the national insurance benefits specified" will provide an income of not less than the guaranteed minimum. There is no provision for the national insurance benefits to be proportioned in the way that Mr E has suggested. For this reason, Mr E's reference to the decision

to excuse only part of his sickness absence does not help his case. Nor does the proportioning suggested by Drs Sheard and Evans on the basis of pre-morbid and post-employment factors; opinions which have, in any event, been shown to require clarification.

30. Therefore, I uphold Mr E's complaint within the limits referred to above. My directions follow.

Directions

31. The Cabinet Office shall review the decision to backdate Mr E's revised injury award to November 2008. As part of the review, the Cabinet Office shall ask their SMA to obtain a specialist's opinion as to the contribution made by the pre-morbid and post-employment factors to Mr E's condition. On receipt of that opinion, they shall ask the SMA to review the decision to reduce Mr E's award from Total Impairment to Material Impairment. If the SMA is of the opinion that Mr E's award should have been revised to Total Impairment, the Cabinet Office must consider the date from which the revised award should be paid. In any event, they shall reconsider whether the revised award agreed in 2009 should be backdated to 2003; on the grounds that Dr Sheard had expressed the view that Mr E was unlikely to earn more than 25% of his previous earnings.

32. The review shall be initiated within 14 days of the date of this determination. Given the need to obtain further and external medical advice, it is difficult to set a firm deadline for completion of this stage of the review. However, the Cabinet Office should aim to have received the medical advice within 28 days of their request. They shall complete their review within a further 14 days of receipt of the medical advice. It would be helpful if they could keep Mr E apprised of progress.

33. In addition, the Cabinet Office shall pay Mr E £500 in recognition of the significant distress and inconvenience of this further period of uncertainty while his case is reviewed, which was avoidable.

Anthony Arter

Pensions Ombudsman
23 November 2016

Appendix

Medical evidence

34. Mr E has submitted a considerable amount of evidence in support of his complaint. All of the evidence has been reviewed in the course of the investigation of his complaint, but it would not be practical to reproduce it here. A selection of the key pieces of medical evidence are summarised in this appendix.

Dr Pilgrim (consultant psychiatrist), November 1995

35. Dr Pilgrim expressed the view that Mr E was suffering from a depressive illness of mild to moderate severity, which had been present since 1983. He also thought Mr E had associated generalised anxiety and symptoms suggestive of mild PTSD. Dr Pilgrim thought there was a clear temporal association between the incidents at work and the onset of Mr E's depressive and anxiety symptoms. He noted Mr E had not experienced depression before the events and said there was no family history or other life experiences to suggest a vulnerability to depression. He said it would be reasonable to say Mr E's present clinical condition was caused by the 1983 riot and what followed. Dr Pilgrim said Mr E had shown some degree of recovery in the intervening 12 years but had a long way to go. He noted Mr E had not been on a full dose of an adequate antidepressant and said he would recommend this before a meaningful prognosis could be given.

Dr Bridge (consultant psychiatrist), 14 October 1998

36. Dr Bridge provided a report, at the request of Mr E's solicitors, in connection with a personal injury claim. Having given a comprehensive history of Mr E's career, his condition and treatment, Dr Bridge noted Mr E's father and brother had been alcoholic and his mother suffered from depression. In his "Conclusions and opinion", Dr Bridge noted Mr E had a reputation for being willing and keen, but also dogmatic and inflexible. He expressed the view that his father's alcoholism would have had an effect on Mr E's confidence. He thought Mr E had "an obsessional type of personality" and required order and structure in his life. Dr Bridge said, in his view, Mr E had come to expect too much of himself and the "macho" culture of the prison service had made it difficult for him to access support as and when needed. He said he could find no evidence that Mr E's routine duties were onerous to him.

Ms Saper (clinical psychologist),29 October 1998

37. In a letter to Mr E's GP, Ms Saper said Mr E was suffering from chronic PTSD. She said his symptoms were very long standing and she was not sure how much improvement could be achieved with therapy.

Ms Saper, 20 August 1999

38. In a letter to Mr E's GP, Ms Saper said there had been no marked improvement in Mr E's condition over the previous 10 months. She said Mr E was still suffering from

chronic PTSD and, in her opinion, was not fit to undertake employment. She said not being able to work was having an adverse effect on Mr E's self-esteem. Ms Saper said Mr E was likely to improve with therapy but it might take some time.

Ms Saper, 24 September 1999

39. In a letter to Mr E's GP, Ms Saper said there had been no marked improvement in Mr E's condition over the previous 10 months. She said Mr E was still suffering from chronic PTSD and, in her opinion, was not fit to undertake employment. She said not being able to work was having an adverse effect on Mr E's self-esteem. Ms Saper noted Mr E had recently discovered that negligence on the part of his solicitors had meant he had missed a deadline for taking action against his former employer. She said the court case had been important for Mr E as a way of obtaining justice and also because he saw it as a final hurdle to putting away reminders of the past.

Dr Bridge, 24 August 2000

40. Mr E's solicitors had asked Dr Bridge to update his report, in connection with further legal action by Mr E. Dr Bridge confirmed that Mr E continued to suffer from PTSD and depression. He said there was no doubt in his mind that Mr E had developed PTSD after the 1983 riot and that this had been exacerbated by subsequent events at work. Dr Bridge thought Mr E had probably returned to his normal level of functioning in 1988/89. He said the 1990 riot would have been a significant stress and, because it served to recall Mr E's experiences in the 1983 riot, it was likely that his PTSD had not been completely extinguished. Dr Bridge noted a riot in 1991 did not appear to have affected Mr E significantly. He thought his PTSD had settled and he had regained function reasonably well. Dr Bridge thought the incidence of the prisoner transfer had precipitated the development of PTSD symptoms and related depression and anxiety.

41. Dr Bridge had been asked to what extent was Mr E's current PTSD triggered or exacerbated by what had happened previously. He was also asked if Mr E was more vulnerable as a result of previous events or was the prisoner transfer in 1993 a new causative event. In response, Dr Bridge said it was difficult to apply a quantitative analysis to Mr E's case because of the complexity of the factors involved; trauma, other inter-current events, and Mr E's reaction. He went on to say, as a rough estimate, 50% of Mr E's current problems would have been triggered by the prisoner transfer in 1993 and 50% having been the previous PTSD caused by earlier events and exacerbated by the prisoner transfer. He said he considered Mr E to be more vulnerable because of what had happened to him before 1993.

42. With regard to Mr E's ongoing litigation, Dr Bridge said this had become a reminder to Mr E of his dissatisfaction, anger and bitterness towards his former employer. He thought this had been exacerbated by an alleged failure on the part of Mr E's previous solicitors.

Dr Day (clinical psychologist), 15 January 2002

43. In a letter to Mr E's GP, Dr Day said, when he had first met Mr E in 2000, he had said his difficulties were primarily focussed on dealing with several traumatic incidents at work. He noted previous psychological therapy had helped Mr E with his coping strategies but that he was still troubled by symptoms, such as flashbacks and nightmares. Dr Day said it was also clear that certain patterns of cognitive, emotional and behavioural avoidance were still in place and preventing Mr E from confronting and resolving his difficulties. Dr Day also mentioned Mr E had just received bad news about his case against the Home Office and this "appeared to have further reinforced his perceptions of injustice and helplessness".

44. Dr Day said, after discussions with Mr E, several factors from his past appeared to be important in "understanding his current difficulties". He mentioned a disrupted childhood as a result of frequent moves. This, he thought, had led Mr E to develop a strong sense of self-determination and assertive social responsibility. He thought these had been reinforced by his father's alcoholism and his parents' separation and divorce. Dr Day then moved on to discuss Mr E's prison career and the effect of the riots and prisoner transfer. He said successive traumatising events had made it impossible for Mr R to live up to his high standards of self-determination and assertive social responsibility.

45. Dr Day said therapeutic work with Mr E had been generally positive. However, he went on to say that recently progress had been slow. Dr Day said, since he had been working with Mr E, several further traumatic life experiences had occurred. He mentioned Mr E having been let down in his compensation claim and a false claim of fraud which had led to his arrest. Dr Day expressed the view that these had served to slow Mr E's recovery. He also noted Mr E had not been able to discontinue his medication in this time and this had further reinforced his feelings of helplessness and dependency. He said Mr E had been able to use therapy to discuss and rationally examine these events.

Dr Charlson (occupational physician), 11 May 2002

46. Dr Charlson was the SMA at the time of the 2002 review of Mr E's case. He said,

> "As previously noted the impairment of earnings must be directly or solely related to work duties. They are based on an assessment of an individual's condition at the time of his retirement. Incidents or events that occur after retirement should not have a bearing on a Section 11 Award.
>
> [Mr E] has sent a report from Dr Day … Dr Day notes that the therapeutic work to date with [Mr E] has been generally positive. However apparently progress in his recent phase of therapeutic work has been relatively slow and difficult for [Mr E]. This is apparently due to the fact that since he has been working with [Mr E] i.e. since 6 March 2000, several further traumatic life experiences

> have occurred. He gives some examples and at least one of these significant events appears unrelated to his service as a Prison Officer.
>
> My conclusions remain the same as in May 2001. The general indication is that [Mr E's] condition is improving, albeit slowly. He has experienced life events since his retirement which have had an adverse effect on his symptoms. I noted this in my previous report of May 2001. Other life events have occurred since then which could not be solely attributed to his occupation as a Prison Officer. To be honest the facts of the case seem to remain remarkably similar to those presented to me in May 2001. It is therefore for similar reasons that I feel unable to alter the impairment of earnings assessment made at that time."

Dr Day, 3 December 2002

47. Dr Day wrote to the Prison Service to clarify certain aspects of his previous report. In particular, Dr Day said he had referred to aspects of Mr E's life, such as his childhood and recent events, but he did not consider these the cause of his current levels of distress. He said the direct triggers for Mr E's chronic PTSD remained focussed on the events at work. Dr Day acknowledged that Mr E felt let down by organisations he believed were there to help him and that he had sought resolution by pursuing legal action against the Home Office. He noted the failure of this action had impeded the progress of Mr E's resolution of his PTSD. Dr Day said Mr E's chronic PTSD left him vulnerable to the effects of stress in his day-to-day life. He expressed the view that, had Mr E not been suffering from PTSD as a result of events at work, more recent events would have had a much reduced effect on him.

Dr Sheard (SMA), 3 February 2003

48. In his report for the scheme administrators, Dr Sheard said,

> "… [Mr E] was deemed to meet pension scheme criteria for an Injury Benefit Award. The impairment of earnings deemed solely attributable to the "injury" was estimated at 25-50% this was then and remains today a "normal" level of assessment for an individual who cannot work in the Prison Service environment, but who should, in time, return to work in a non-confrontational office type environment. In the circumstances, based on the evidence provided, this appears to have been a reasonable level of assessment."

49. Dr Sheard referred to the previous reviews of Mr E's award in January 2000, May and August 2001, and May and August 2002. He said he had reviewed the reports provided by his colleagues and the medical evidence submitted. In particular, he referred to Mr E's GP records, Dr Day's report of 15 January 2002 and Dr Bridge's reports of 14 October 1998 and 24 August 2000.

50. Having acknowledged that an injury benefit award was appropriate, Dr Sheard said the only issue was "the impairment of earnings deemed as solely attributable to the posttraumatic stress disorder". He went on to say the medical evidence clearly

indicated Mr E had "significant premorbid risk factors in his family history and personality". He also said, since Mr E's retirement, issues relating to his employment and others unrelated to his employment had perpetuated his symptoms. Dr Sheard said neither pre-morbid risk factors nor post-employment factors should be considered in any assessment of impairment of earnings deemed solely attributable to the injury at work. He went on to say,

> "In the circumstances, any impairment of earnings calculation must reflect the same and so any request for a 100% award must surely fail on procedural grounds. The most recent psychological report suggests, however, that had [Mr E] not been subject to trauma whilst in the Prison Service then he would have coped better with subsequent life events. This too does not suggest sole attribution for impairment of earnings. I note the psychologist has indicated the most notable trauma being "let down by people in authority". As [Mr E's] qualifying injury is for posttraumatic stress disorder as a result of prison riots any impairment of earnings deemed to be as a result of perceptions of "being let down by people in authority" must also be excluded from an impairment of earnings assessment …
>
> In summary, this gentleman meets pension scheme criteria for an Injury Benefit Award. At present he appear is [*sic*] unable to work in any reasonable capacity. This is, in part, due to ongoing difficulties with his previous employment. He has some nine years until his sixtieth birthday. During this period it is possible he would be able to return to low grade, non-confrontational employment. Some future earnings can therefore be anticipated. These are, however, unlikely to exceed 25% of his previous wages even taking into account inflationary effects. As indicated above, due to the premorbid and post-employment elements of his illness, I believe that the impairment of earnings solely attributable to posttraumatic stress disorder must be reduced. It is difficult to be definitive with regard to the affects [*sic*] of the same, but these affects must be deemed to be greater than 25% of impairment of earnings. In the circumstances, I believe it is not unreasonable to consider this gentleman's impairment of earnings deemed solely attributable to the posttraumatic stress disorder to be approaching 50% of his previous earnings. However, I believe it would be premature to suggest his condition has significantly deteriorated or that he has made a case to suggest that the impairment of earnings solely attributable to the posttraumatic stress disorder is greater than 50% of his previous earnings in the circumstances, I would not wish to alter our earlier advice."

Dr Coleman (GP), 8 July 2008

51. In a letter to the Pensions Advisory Service, Dr Coleman said (amongst other things) Mr E was generally fit and well, and had no major health problems until the 1983 riot. He said Mr E had required medical intervention following the 1990 riot but things had settled and he had been ok until 1993. Dr Coleman said there was no doubt Mr E

suffered from chronic PTSD. He referred to the reports provided by Drs Pilgrim, Bridge and Day. He then went on to say he was not aware of any other major contribution to Mr E's ongoing ill health and mental stress. He said he felt Mr E's problems stemmed from involvement in the riots and subsequent events at work.

Dr Walsh, undated notes

52. In his notes, Dr Walsh gave a summary of Mr E's medical history and described his current medication. He noted that Mr E saw his GP every four weeks and was in contact with a community psychiatric nurse, but had refused to attend an anger management course. He noted Mr E had attended a condition management course. Dr Walsh described Mr E's daily routine. He expressed the view that, "in his present prescribed precariously stable present situation", Mr E would be unfit to return to his former job. He also noted that Mr E had been turned down for employment because of his history. Dr Walsh referred to there being an absence of contemporaneous medical evidence. He concluded,

> "In summary he is unfit for all work at the moment and likely to remain so for the foreseeable future … It is not absolutely clear but a case for disability is to be based on the fact that he has a pre-morbid personality that was apparently normal, that this has been changed radically and apparently irreversibly …
>
> With regard to the question of permanency it clearly needs to be taken into account his refusal to make himself available for anger management and/or further treatments …
>
> There appears to be no contribution to his present difficulties to anything other than the events previously described during and immediately after his employment with the prison service …"

Dr Evans (SMA), 27 October 2009

53. In his report, Dr Evans listed the medical evidence he had considered as follows: specialists' reports dated 28 March 1994, 14 October 1998, 24 September 1999, 24 August 2000, 15 January and 3 December 2002, and an undated report (likely to have been Dr Pilgrim's); and reports from Mr E's GP dated 23 March 1994 and 8 July 2008. He also said he had notes from his colleague's (Dr Walsh) consultation with Mr E on 9 October 2009. Dr Evans noted that many of the documents which had been considered in the past were no longer available due to the passage of time.

54. Dr Evans commented that an assessment of impairment of earning capacity related only to the effects of the injuries sustained through "the causal incidents". He then went on to describe how earning capacity should be assessed. He said the applicant's background skills, qualifications, and the kind of employment which could be undertaken, allowing for the effects of the injury, were relevant. He also said whether the applicant could undertake full time or part time work was relevant.

55. Dr Evans referred to the approach taken by Dr Sheard, which he described as determining the extent to which Mr E's earnings were permanently impaired and then considering how much of the impairment was the result of his qualifying injury. He said he would adopt the same approach.

56. Dr Evans noted that Mr E had been unemployed at the time of Dr Sheard's assessment and had remained unemployed since. He noted the evidence from Mr E's recent consultation indicated he remained unfit for all work and was likely to remain so for the foreseeable future. He commented that spontaneous improvement in Mr E's condition was not likely and, given the duration of his illness, the likely benefit of any further intervention must be limited. Dr Evans expressed the view that it was becoming increasingly unlikely that Mr E would ever return to the workplace. He assessed Mr E's future earning potential as "close to zero". He assessed the extent to which Mr E's earnings were permanently impaired as being "close to 100%".

57. Dr Evans went on to say,

> "I will now turn to the issue of how much of this impairment is the result of [Mr E's] qualifying injury. Dr Sheard reached the view that pre-morbid and post-employment elements of [Mr E's] illness were contributing to his impairment of earnings. The impairment of earning capacity for the injury benefit award relates *solely* to the effects of the qualifying injury. Any impairment resulting from other factors is not taken into account. Dr Sheard was of the view that at least 25% of [Mr E's] total impairment stemmed from the aforementioned pre-morbid and post-employment elements. On that basis, it was Dr Sheard's opinion that on balance of probability the extent to which [Mr E's] earning potential was permanently reduced solely as a result of his qualifying injury fell somewhere in the 25% to 50% band. Dr Sheard's assessment appears to accord with that of other clinicians who have assessed [Mr E's] case previously. Dr Sheard acknowledges that it is difficult to be definitive with regard to the effects of these pre-morbid and post-employment elements."

58. Dr Evans then referred to Dr Coleman's letter of 8 July 2008. He noted Dr Coleman's comment that he was not aware of any other major contributions to Mr E's ongoing ill health. He said there was information on file which suggested Dr Coleman's understanding might be incomplete. Dr Evans listed examples as follows: Dr Day's report of 3 December 2002 referring to the failure of his legal action impeding resolution of his condition; Dr Day's report of 15 January 2002 referring to slow progress because of "several further traumatic life experiences"; Dr Bridge's report of 24 August 2000 referring to impact of ongoing litigation on maintaining Mr E's symptoms; an IDR report from 2007 recording Mr E as saying his condition had worsened since his retirement because of a fraud investigation and his attempts to find work. Dr Evans said these comments all referred to specific issues in Mr E's life which took place after he left employment and which had contributed to the continuation or worsening of his mental health.

59. Dr Evans concluded,

> "In my opinion, Dr Sheard's original advice on the impact of the pre-morbid and post-employment elements of [Mr E's] illness was not unreasonable. It is also my opinion that the new evidence provided by [Mr E] is insufficient, given the other evidence on file, to demonstrate that on balance of probability his current incapacity stems solely from the effect of his qualifying injury. I therefore have no basis on which to alter Dr Sheard's advice that at least 25% of [Mr E's] total earning impairment stems from a combination of pre-morbid and post-elements.
>
> Combining these two assessments, it is my opinion that, on the balance of probability, the extent to which [Mr E's] earnings have been permanently impaired as a result of his qualifying injury lies in the 50% to 75% range."