

Ombudsman's Determination

Applicant	Mr R
Scheme	Police Injury Benefit Scheme (the Scheme)
Respondents	Derbyshire Constabulary (DC)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by DC.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr R is dissatisfied because DC has reduced his injury benefit entitlement from Band 3 to Band 1 in 2015. Mr R's complaint is in relation to the decision made by DC in 2015.

Background information, including submissions from the parties

4. Mr R was employed by DC between April 1966 to 1979, when he emigrated to Canada. Mr R returned the UK in 1981 and re-joined DC.
5. On 29 July 1988, Mr R retired as a result of injuries from an accident on duty. An assessment was made by selected medical practitioner (**SMP**), Dr Wells, who concluded that Mr R's degree of disablement was 35%, placing him in Band 3.
6. A review was undertaken in April 2007 by Dr Herbert, who initially considered that there was no change to Mr R's award. However, within a few days Dr Herbert completed a certificate that said the degree of disablement was 0%, placing Mr R in Band 1.
7. The 2007 review was in relation to a Home Office circular, now unlawful, which said that reduction to Band 1 with regard to former officers that had reached state retirement age, was flawed.
8. On 18 September 2008, another SMP, Dr Sampson carried out a re-assessment of Dr Herbert's decision. Dr Sampson upheld Dr Herbert's decision.

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9. On 13 November 2013, Mr R appealed this decision by requesting a judicial review of the Home Office Guidance of 2004. The Police Pension Authority consented to a further reconsideration, which was carried out by Dr Major.
10. On 7 July 2014, Dr Major concluded that there had been a substantial change in the degree of disablement which was 0.87%. He also said that Mr R had been able to apply various skills and experience to his personal situation in order to secure employment as private investigator.
11. The SMP re-assessed Mr R's earnings capacity against the average earnings shown in the Annual Survey of Hours and Earnings (**ASHE**).
12. In his report, Dr Major said that the comparator used for determining Mr R's earnings capacity was the potential uninjured earnings capacity. The SMP determined that there had been an alteration in Mr R's degree of disablement between 1993 and 2007, because his earnings capacity had been influenced by securing employment at BSG in Canada.
13. This decision was appealed by Mr R in July 2014 and the matter was considered by the Police Medical Appeals Board (**PMAB**). It upheld Dr Major's decision and Mr R's benefit entitlement was reduced to Band 1.
14. As the complaint was subject to an appeal to the PMAB, it is exempt from having to go through the two-stage internal dispute resolution procedure (**IDRP**).
15. Mr R brought the complaint to the Pensions Ombudsman Office (**TPO**) on 1 December 2015.

DC's position:

16. The review was conducted in accordance with the applicable Regulations.
17. Mr R's degree of disablement since the assessment in 1993 has altered by virtue of the fact that he has clearly adapted to his injury and that his functional capability for work has changed substantially.
18. In 1993, Mr R was only working part-time and by his own submission, since 2002 he was capable of undertaking full-time work (35 hours per week) and earning a substantial salary.
19. DC considered that as the uninjured earnings capacity and the injured capability are very similar, the degree of disablement therefore fell to 0.87%.

Mr R's position:

20. Mr R has made detailed and substantial submissions which have been considered.
21. Dr Major has used a comparison of Mr R's actual earnings with either the National Average Earnings (**NAE**), ASHE and a job and wages comparison exercise, which are not in line with the Regulations.

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22. The SMP failed to share his medical report with Mr R as set out in Medical Reports Act 1988. However Mr R later admits that DC forwarded the report to him.
23. Mr R has suffered a loss of pension income of about £750 per month.
24. Mr R has referred to case law that he thinks may have some bearing on his case.
25. His Doctors in Canada concluded that his degree of disablement remains unchanged so Dr Major is wrong by saying that there was a substantial change in the degree of his disablement as he never examined Mr R.

Adjudicator's Opinion

26. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by DC. The Adjudicator's findings are summarised briefly below:-
 - The complaint is focussed on Dr Major's conclusions from July 2014. Dr Major was required to consider whether Mr R's degree of disablement had altered between 1993 and 2007. He concluded that he found objective evidence that Mr R's degree of disablement had substantially altered. In the circumstances where the SMP has determined that there has been a change in the degree of disablement there is further action for the SMP to take. At that point there was a reason to revise Mr R's award.
 - The relevant regulations are:
 - Regulation 7 (5):

“Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force”.
 - Regulation 37 (1):

“Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the police authority shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered; and if after such consideration the police authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly”.
 - And, Regulation 30, referred to above.
 - The Adjudicator said that in accordance with the Regulations Mr R's benefit could be revised if the SMP concluded that his degree of disablement had altered, and on further consideration, that the alteration had been substantial.

- DC has concluded that Mr R's degree of disablement since the assessment in 1993 has altered by virtue of the fact that he has clearly adapted to his injury and his functional capability for work between 1993 and 2007 had altered substantially.
- The case law relevant to this issue can be found in Appendix 2 below.
- Turner [2009] confirms:

"If there is now some job available which the defendant would be able to take by virtue of either some improvement in his condition or in the sudden onset of availability of such a job that would be a relevant factor".

- So the availability of a new job is a relevant factor, and should be a consideration, but the Adjudicator did not think that this alone determines whether degree of disablement has altered.
- The Adjudicator believed that the comments of the Judge in Laws [2010] was key. The Judge confirms:

"the only duty – is to decide whether, since then, there has been a change: 'substantially altered', in the words of the Regulation. The focus is not merely on the outturn figure, but on the substance of the degree of disablement has altered."

- Having reviewed Mr R's job profile, the Adjudicator thought that the process in establishing whether it was a substantially new or different role which influenced the degree of disablement, was reasonable. Mr R was medically capable of full-time work in a semi sedentary position. He was capable of driving a vehicle, using I.T. and acquired other skills that would be transferable to other types of work.
- Mr R has raised a concern about Dr Major's use of the ASHE in the assessment of his injury award and its impact on the level of his injury award. The Adjudicator said that her role in connection with this case is to establish if the process followed by DC in reviewing whether Mr R's injury benefit award was correct and that the decision reached by them was made properly. It is not to decide the level of injury benefit award that was appropriate to Mr R. The Regulations do not prescribe a set method for DC to follow in assessing a person's earnings capacity in determining their degree of disablement. In the Adjudicator's view, it was open to it to decide how it assessed Mr R's particular case.
- Mr R has referred to the non-provision of a medical report from the SMP. However, as admitted by Mr R, DC subsequently forwarded the report to him and he had an opportunity to provide his comments on the report in question to DC.
- In conclusion, the Adjudicator was satisfied that DC had properly considered whether a substantial change in Mr R's degree of disablement, as required by the Regulations, took place. In view of a change in Mr R's medical or functional activity level, as stated by Dr Major, it follows that in his opinion Mr R was capable of having undertaken a job at the time of the original assessment, in 1993. So, in Dr

Major's view, his degree of disablement has altered and DC can legitimately alter his benefit on the basis of the availability of the new role alone.

- The skills identified by the SMP appear to be virtually the same as those he had used in his injured state whilst working in Canada so the uninjured and injured capacity for work are the same or, in the worst case, very similar.
- The Adjudicator has also considered the case law that Mr R has referred to and asked DC to provide comments. However, she said that they did not cause her to change her view.
- It was therefore the Adjudicator's opinion that this complaint should not be upheld.

27. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr R for completeness.
28. In his further submission, Mr R mostly referred to events pre-dating the DC's decision made in 2015. However, as previously explained to Mr R, I cannot consider these as they fall outside of my jurisdiction.
29. Mr R referred to other police officers who were in a similar position to him and continued to work well into their sixties. Mr R believes that this may have a positive bearing on his case because he had previously been a serving member of the Calgary Police and could have continued to work beyond the retirement age in the UK.
30. Mr R referred to Dr Major's report of July 2014 and questions the relevance of this report in relation to Regulation 7(5).
31. Mr R maintains that the level of income is not an indication of degree of disablement. He used his existing skills in his current work but because of his injury he could not be as effective as he would have liked. Therefore his income is not as high as it was before his injury.

Ombudsman's decision

32. The review of injury benefits under Regulation 37 was the subject of a number of court cases and Ombudsman determinations over the past few years. There is now a considerable body of authority indicating how such a review should be conducted.
33. Whilst the Home Office is responsible as a whole for the Scheme's regulations, they deem each Police Authority to be the Scheme Manager at local level. DC was responsible for ensuring its SMP interpreted the 2006 Regulations correctly when carrying out a review.

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34. Mr R refers to other police officers being in similar position to him and continuing to work beyond age 60. However, the facts of those cases may be materially different to Mr R's and I consider each case on its own merits.
35. I have considered Dr Major's report and found nothing to contrary to Mr R's assertion with regard to the relevance of the Regulation 7(5), as stated in that report.
36. It is clear from the Regulations the review is a mandatory duty and requires no decision or exercise of discretion. As to the basis of the 2015 decision, following from the 2007 grading, which was clearly carried out, his earnings capacity had been influenced by securing employment in Canada. That is reasonable as it is evidence of a shift in capability from 2007 when DC acknowledged it did not know Mr R was working. If this fact had been disclosed before, then it would have made a difference to Mr R's degree of disablement in 1991 and 1993.
37. I find, based on the evidence that has been presented to DC, it has considered the relevant factors in arriving at its decision to reduce Mr R's injury benefit to Band 1. Therefore, there are no justifiable grounds for me to find that DC's decision was perverse or that the process it undertook in reaching its decision was flawed.
38. Therefore, I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
19 October 2017

Appendix 1

Regulation 37 - Reassessment of Injury Pension under the Police (injury Benefit) Regulations 2006.

(1) Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the police pension authority shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered; and if after such consideration the police pension authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly.

(2) Where the person concerned is not also in receipt of an ordinary, ill-health or short-service pension under the 1987 Regulations or the 2006 Regulations, if on any such reconsideration it is found that his disability has ceased, his injury pension shall be terminated.

(3) Where payment of an ill-health pension is terminated in pursuance of regulation K1(4) of the 1987 Regulations or regulation 51(8)(d) or (6) of the 2006 Regulations, then any injury pension under regulation I above payable to the person concerned shall also be terminated.

(4) Where early payment of a deferred pension ceases in pursuance of regulation K I (7) of the 1987 Regulations or regulation 51(8) of the 2006 Regulations, then any injury pension under regulation I I above payable to the person concerned shall also be terminated.

Reference of medical questions

30 – (1) Subject to the provisions of this Part, the question whether a person is entitled to any, and if so what, awards under these Regulations shall be determined in the first instance by the police authority.

(2) Subject to paragraph (3), where the police authority are considering whether a person is permanently disabled, they shall refer for decision to a duly qualified medical practitioner selected by them the following questions-

- (a) whether the person concerned is disabled;
- (b) whether the disablement is likely to be permanent,

Except that, in a case where the said questions have been referred for decision to a duly qualified medical practitioner under regulation H1(2) of the 1987 Regulations, a final decision of a medical authority on the said questions under Part H of the 1987 Regulations shall be binding for the purposes of these Regulations;

And, if they are further considering whether to grant an injury pension, shall so refer the following questions-

- (c) whether the disablement is the result of an injury received in the execution of duty, and
- (d) the degree of the person's disablement;

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And, if they are considering whether to revise an injury pension, shall so refer question (d) above.

Appendix 2

Turner v The Police Medical Appeal Board [2009]:

‘Mr Lock accepts that if there is now some job available which the defendant would be able to take by virtue of either some improvement in his condition or in the sudden onset of availability of such a job then that would be a relevant factor .’

Laws, R (on the application of) v The Police Medical Appeal Board [2009]:

‘In my judgement the following questions therefore had to be determined by the SMP and the Board in this case:

- 1.) had the claimant’s degree of disablement, as a result of the duty injury altered since the last review of her injury pension in 2005? By regulation 7 (5), this question was to be determined by reference to the degree to which the claimant’s earning capacity had been affected as a result of the duty injury.
- 2.) if so, had it substantially altered?
- 3.) if so, what revision, if any should be made to the claimant’s injury pension as a result of this substantial alteration?

Metropolitan Police Authority v Laws & Anor [2010]:

‘The premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty – the only duty – is to decide whether, since then, there has been a change: “substantially altered”, in the words of the Regulation. The focus is not merely on the outturn figure, but on the substance of the degree of disablement.’