

Ombudsman's Determination

Applicant	Mr Y
Scheme	Police Pension Scheme (the Scheme)
Respondent	Essex Police

Outcome

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

Complaint summary

3. Mr Y's complaint against Essex Police, the employer, concerns its refusal to pay him Injury Benefit (**IB**).

Background information, including submissions from the parties

4. On 24 April 2002, Mr Y sustained an injury (**index event**) whilst on duty.
5. On 22 September 2003, following a period of sickness Mr Y was referred to Mr Flanagan, Consultant Orthopaedic Surgeon, who said that on examination, Mr Y had an irritated medial synovial plica and he suspected a degenerative tear of medial meniscus. Mr Flanagan said that he would be arranging an arthroscopy for Mr Y.
6. On 26 April 2004, Mr Flanagan carried out an arthroscopy on Mr Y's left knee.
7. In March 2012, Mr Y was assessed by Dr Elrington, Consultant Neurologist. An MRI of the brain and spine showed no significant abnormality and he was diagnosed with chronic migraine with medication overuse.
8. In April 2012, Mr Y was referred to Dr Vanner, Selected Medical Practitioner (**SMP**), who considered that the musculoskeletal issues permanently disabled Mr Y and "he is likely to be both certified as permanently disabled but also needs ill health retirement." Dr Vanner noted the various knee symptoms and the surgical interventions and the chronic migraine. She said Mr Y's leg, which had not undergone the rotational osteotomy was in fact worse than the leg that had received surgery and reported that the chronic migraine was secondary to analgesic medication.

9. On 21 August 2012, Mr Y was considered to be permanently disabled from performing the ordinary duties of a police officer on the basis of chronic migraine and arthritis of the right and left knee joints.
10. On 31 January 2013, Mr Y was medically retired from Essex Police under Regulation A20 of the 1987 Police Pension Regulations.
11. On 18 February 2013, Mr Y applied for IB claiming injury on duty based on the 2002 index event..
12. On 1 July 2013, in accordance with Regulation 30(2)(c) and (d) of The Police (Injury Benefit) Regulations 2006, Mr Y was clinically assessed by the Scheme's SMP Dr Cheng, Occupational Physician. Dr Cheng, in his report dated 4 July 2013, confirmed that he had considered Mr Y's OH medical file, his GP records and his personnel file rendered in accordance with Home Office advice on referrals for decision under regulation H1 for permanent disablement. Dr Cheng said, in his opinion that Mr Y's chronic migraine and arthritis of the right and left knee joints have no direct causal link to the index event and Mr Y suffered soft tissue injury. He referred to Mr Y's application for IB based on the index event following which he claimed whiplash and bilateral knee injury. However, he noted that the RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013) completed on 30 April 2002 stated 'laceration, bruising to back and neck, cramp to right leg' and no mention of knee pain. It was confirmed Mr Y was on sickness absence for 10 days and had physiotherapy. The physiotherapist stated in a letter dated 15 November 2002, that Mr Y was the driver of the vehicle that sustained an impact on the passenger side and Mr Y complained of recurrent cramps in thighs and calves.
13. Dr Cheng noted that the arthroscopy performed on 26 April 2004 showed minor tears of both menisci and the specialist reiterated that these changes are secondary to his external tibial torsion which is fairly marked. Dr Cheng further referred to Mr Flanagan's letter dated 16 January 2006, in which he expressed the opinion that "I would say that the arthroscopy and proposed further surgery is a direct result of the accident as Mr Y has had no previous trouble from his knees and there is nothing to suggest that his symptoms would have occurred spontaneously." However, Dr Cheng said that on the balance of probability, this was written to facilitate the funding for the operative procedure, because it contradicts his previous opinion in 2004 that the primary condition was bilateral external tibial rotational mal-alignment requiring corrective osteotomy.
14. Dr Cheng certified that Mr Y suffered from chronic migraine and arthritis in both knees and is permanently disabled from performing the ordinary duties of a member of a police force. However, the disablement was not the result of an injury received in the execution of duty as a member of a police force. He was of the opinion the likely causative factor was natural wear and tear with the passage of time.
15. On 4 September 2013, Mr Y appealed the decision of The Police Medical Appeals Board (**the Board**) stating that the reason for his retirement was a direct result of

injuries sustained in the execution of his duty from the index event. He submitted further evidence including Mr Elrington's report in relation to causation for his migraines.

16. On 25 November 2013, Dr Cheng was asked by the Metropolitan Police Pension Authority to reconsider his initial decision taking account of new medical reports. Dr Cheng considered Mr Y's OH unit medical file, his GP's records, his personnel file rendered in accordance with Home Office advice on referrals for decision under regulation H1 for permanent disablement and all relevant referral documents and medical evidence. Dr Cheng noted the discrepancy between what Mr Y claimed on the injury award application dated 18 February 2013 regarding the index event and to what was stated on the RIDDOR that was completed on 30 April 2002. It was his opinion that the index event of 24 April 2002 was a soft tissue injury, which, on the balance of probability could not have caused the degenerative changes in Mr Y's knee or migraine. He held that the likely causative factor is natural wear and tear with the passage of time.
17. On 7 March 2014, the Board comprising of Dr Wallington, Consultant Occupational Health (OH) Physician, Dr Krishan Consultant OH Physician, Dr Holmes Consultant Neurologist and Mr Smith consultant Orthopaedic Surgeon took into consideration all relevant medical evidence including Dr Cheng's and Mr Flanagan's report, including Mr Flanagan's clarification that there was no contradiction between his view about the underlying problem on the one hand and the reason that the arthroscopy and surgery was required when it was. All found in favour of the Pension Authority and said, "as a consequence the Board concludes that the disablement was neither caused by nor substantially contributed to by an injury in execution of duty."
18. During the appeal, the Board also took account of clinical assessments performed by its Consultant specialists. The first specialist addressed the issues concerning Mr Y's diagnosis of chronic daily migraine. He noted that in 1998 prior to the index event Mr Y complained about left sided headaches but that after there was no documentation or complaint of headaches for a number of years after the index event. After the road traffic accident in April 2002, headaches were not a problem and only became significant in 2012 when Mr Y saw Dr Elrington. The specialist was of the opinion that Mr Y was overusing analgesics for the pain which came from his neck pain and not his headaches. He said it is usual in analgesia overuse that Mr Y's migraines would increase in frequency. He noted that with the decrease in the use of analgesics Mr Y's headaches have improved and lessened in frequency but he would benefit from a greater occipital nerve block and failing this the use of botulinum toxin injections. It was his opinion that the headaches were never a reason for permanent restriction from duties and with additional treatment could be put completely into remission.
19. The second specialist addressed Mr Y's orthopaedic condition and said that he had a congenital rotational deformity which had resulted in degenerative changes in both knee joints. He had a documented history of right knee symptoms prior to the index

event and following the index event there was a gap of several weeks before the onset of Mr Y's bilateral knee symptoms. The second specialist was of the opinion that as corrective surgery to Mr Y's left knee has been successful, he expects a similar result on the right knee following corrective surgery to the right tibia.

20. The Board held that the disablement was neither caused by nor substantially contributed to by an injury in the execution of duty. .

Adjudicator's Opinion

21. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by Essex Police. The Adjudicator's findings are summarised briefly below: -

- Under Regulation 11(1) of the Police (Injury Benefit) Regulations 2006 "the person making the claim must cease or has ceased to be a member of a police force and the person must be permanently disabled as a result of an injury received without his own default in the execution of his duty". Determining whether this test is satisfied is a question of fact for Essex Police. In reaching the decision, Essex Police must take into account all relevant but no irrelevant factors. It is not for the Ombudsman to agree or disagree with the medical opinions formed by medical professionals.
- The Ombudsman's role is to decide whether Essex Police has abided by the regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. If there are flaws in the decision-making process, the Ombudsman can require Essex Police to look at Mr Y's case again. However, the weight which is attached to any of the evidence is for the Essex Police to decide, including giving some of it little or no weight. It is open to it to prefer the advice of its own medical advisers unless there is a cogent reason why it should not, or should not without seeking clarification. This might include errors or omissions of fact on the part of the medical adviser, or a misunderstanding of the relevant regulations. Mr Y's case was reviewed on this basis.
- Mr Y says Essex Police failed to take into account all relevant evidence, such as medical reports by other medical practitioners not instructed by Essex Police. Further, he has said it was perverse for the Board to accept the opinion of Dr Cheng against that of Mr Flanagan, Dr Vanner, Dr Bulpitt and Mr Lungley. However, there is a difference between ignoring evidence and considering evidence but attaching little or no weight to it. As explained above, it is for Essex Police to apportion weight (if any) to the relevant medical evidence as it sees fit. The Adjudicator's role is to ensure Essex Police has at least considered all the relevant information. The Adjudicator could see that the Board has made its decision based on all relevant evidence including Mr Flanagan's report. As such, she was satisfied Essex Police has considered all the relevant information.

- Essex Police needed to consider Mr Y's IB application in line with the Scheme's regulations and properly explain why his application either can or cannot be approved. The Adjudicator was satisfied that Essex Police complied with the Scheme's regulations and that all relevant evidence has been considered. A difference of medical opinion between the SMP and Mr Y's treating doctors as to the direct causal link with his permanent disablement is not sufficient for the Ombudsman to say that Essex Police's decision to accept the opinion of the SMP, who are experts in occupational health, was flawed.
- Mr Y says that Dr Cheng's report does not sufficiently address the issue of his permanent disablement on the basis of chronic migraine. The Adjudicator saw no evidence to show that Dr Cheng did not review any aspect of Mr Y's concerns or condition. Dr Cheng's report took into account all relevant evidence and referred to appropriate medical research. She appreciated that Mr Y disagrees with the conclusions reached, and presented his counter arguments, but while she recognised that Mr Y disagrees with Dr Cheng's report, that is not a sufficient reason for her to remit the matter back to Essex Police for the application to be reconsidered.
- Mr Y says his injury has been linked by an Independent Home Office SMP, the Police Force Medical officer and the head of Occupational Health, to his injury that he suffered whilst on duty in April 2002. He says all these reports agree that his injury is linked to the index event. The Board has accepted the advice of its own SMP. It is for the Board to determine the weight it gives to each piece of available evidence and, unless there is a compelling reason why it should not, it may prefer the advice it receives from its own advisers.
- Mr Y says that the only entry on his GP record is from 13 February 1987 which details minor rather than significant right-knee problems. Further, he says that the record is over 15 years old and only refers to his right knee, as such there is no evidence of any deterioration in the condition of his left knee prior to the index event. Mr Y's GP letter dated 12 July 2017, confirms that on 13 February 1987 he complained of a seven month history of pain in the right knee and underwent physiotherapy for it. I understand Mr Y's frustration in respect of this, however I can see that the Board has considered this evidence and other relevant information when coming to its decision. It was of the opinion that the index event did not immediately result in pain in the right knee and the evidence is that there was a gradual deterioration over time. Further, in his report, Dr Cheng took into consideration both Mr Y's right and left knee and was of the opinion that there was arthritis of the right and left knee joints which have no direct causal link to the road traffic incident of April 2002. As such, the Adjudicator believed it had considered all the relevant facts and followed the procedure correctly.

- Mr Y says that it cannot be reasonable or sensible for the Board to reach the decision that his permanent disablement was due to a condition prior to 24 April 2002. However, the opinion of the medical experts preferred by the Board, was that it was the underlying, congenital condition – rather than the “index event” – that was the cause of Mr Y’ permanent disablement. It is not for the Adjudicator to agree or disagree with the medical opinions formed by medical experts; she can only consider whether the decision reached by Essex Police was properly made. She was of the view that the Board has considered all the relevant facts and followed the procedure correctly.
 - Mr Y has referred to the recent case law *Evans v Commissioner of Police for Cheshire*. He says that as a result of this case it follows that the decisions made by Dr Cheng and the Board are invalid as their diagnosis is completely different to that of the original SMP. However, looking at the case law in question, this does not change the outcome in this case. The cause of Mr Y’s disability, chronic migraine and arthritis of right and left knee joints is not in dispute. Dr Vanner, the original SMP does not comment in his report as to the cause of Mr Y’s permanent disability. So, it cannot be reasonably argued that Dr Cheng had contradicted Dr Vanner by stating that the cause of the permanent disability was degenerative deterioration rather than the index event.
22. Mr Y did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mr Y 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 Y for completeness.

Ombudsman’s decision

23. Mr Y has said that Dr Vanner’s opinion that the injury was post traumatic arthritis of right and left knee joint, which could only mean that a significant external impact to both knees must have taken place, clearly undermines the Boards findings. However, I do not find that there is sufficient evidence to support this assertion. During the appeals process the Board considered the available medical evidence and referred Mr Y’s case to two further Consultant specialists. The medical opinion was sufficiently thorough and set out why Mr Y did not meet the criteria for IB.
24. Mr Y has further said there is no evidence before the appeals process of any deterioration in the condition of his left knee prior to the index event. However the timing of onset and the cause of symptoms are not necessarily the same thing. Dr Cheng in his report dated 4 July 2013 refers to Mr Y’s arthritis of the both right and left knee joints having no direct causal link to the index event. This opinion that was shared by the Consultant who formed part of the medical appeal board.
25. It is my view that the SMP’s opinions during the appeal process provided Essex Police with a comprehensive opinion, allowing it to reach a decision. There is no sign that it failed to review Mr Y’s concerns or condition properly. I appreciate that Mr Y

disagrees with Essex Police's decision not to grant him IB. However, Mr Y's disagreement is not a sufficient reason for me to remit the matter back to Essex Police for his application to be reconsidered.

26. Mr Y questions how Essex Police can conclude that he is not eligible for IB, when there is medical evidence that states otherwise. He further adds that the Board when referring to the 'significant right knee injury' have stated inaccurate information as his GP medical notes refer to a brief entry of pain the right knee on 13 February 1987. Having considered the way that the medical evidence was set out and assessed in the Board's decision, I do not agree that its conclusion was based on inaccurate information. Its decision was based on a balanced medical assessment which took account of all the clinical investigations which had taken place.
27. I find, based on the evidence that has been presented, that Essex Police has considered the relevant factors in arriving at its decision not to grant Mr Y IB. I do not consider that there are justifiable grounds for me to find that the process Essex Police undertook in reaching its decision was flawed.
28. Therefore, I do not uphold Mr Y's complaint.

Karen Johnston

Deputy Pensions Ombudsman
26 March 2019