PO-17071

Ombudsman's Determination

Applicant	Dr Y
Scheme	Police Injury Benefit Scheme (**the Scheme**)
Respondent	Thames Valley Police Pensions Authority (**the Authority**)

Outcome

1. I do not uphold Dr Y's complaint and no further action is required by the Authority.

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

Complaint summary

3. Dr Y's complaint arises because the Authority rejected his application for a disablement gratuity from the Scheme.

Background information, including submissions from the parties

4. Dr Y was a police officer working for the Authority.

5. On 3 August 1994, Dr Y was interviewed by senior officers as part of a disciplinary investigation. He then reported absent on sick leave and did not return to work.

6. In March 1995, Dr Foster (Police Surgeon) certified that Dr Y:-

   - was suffering from anxiety and depression;
   - the disablement was permanent; and
   - the condition was not the result of an injury received in the execution of his duty.

7. The Authority compulsorily retired Dr Y on the grounds of ill-health on 23 April 1995.

8. Dr Y successfully appealed for an injury award (comprising a lump sum gratuity and an injury pension). Dr Foster certified that the degree to which his earning capacity had been affected was 35%.

9. Dissatisfied with Dr Foster's certification, Dr Y appealed the decision.

10. Dr Bevan-Jones (an independent medical referee appointed by the Police Medical Appeal Board) accepted a diagnosis of Post-Traumatic Stress Disorder (**PTSD**). In his report dated 27 February 1997, he concluded:-

> "In my view [Dr Y] is incapable of working or earning a living at present. His condition would make him unable to obtain a job or if he were to get one to hold it down.
>
> I estimate the degree to which his earning capacity has been effected is 100% at present."

11. In April 1997, Dr Foster wrote to the Authority:-

> "Thank you for your communication saying that the Appeal of [Dr Y] succeeded and he is told that his earning capacity has been affected by 100%. I enclose the various forms altered accordingly. As we agreed, in no way could he be considered 100%, therefore in order to keep him in the top bracket we will call it 80%. We have agreed that he should be reviewed in one year's time in view of this high percentage."

12. Dr Foster issued a certificate for 80% loss of earning capacity and the reason for permanent disablement was stated as anxiety and depression. But, since Dr Y remained in Band 4, he suffered no financial loss through this change.

13. Dr Y was reviewed in 2001, when there was no change to his disablement Band. He was next reviewed in June 2004, when the selected medical practitioner (**SMP**) (Dr Leeming-Latham) maintained the level of disablement at 80%. However, he also said Dr Y should attempt treatment; unless this was pursued within two years, it might be appropriate to consider apportioning the injury award. A further review date was set for two years' time.

14. The further review was carried out in 2006 and concluded that the degree of disablement should be reduced from 80% to 65%, placing Dr Y in Band 3. Accordingly, the Authority reduced his injury pension.

15. Dr Y unsuccessfully appealed the matter and complained to our Service that the Authority had refused to revisit his claim for injury benefit under regulation 32(2) of The Police (Injury Benefit) Regulations 2006.

16. Regulation 32(2) says:-

> "The Police Pension Authority and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him, or as the case may be it, for reconsideration, and he, or as the case may be it, shall accordingly reconsider his, or as the case may be its, decision and, if necessary, issue a fresh report, which, subject to any further reconsideration under this paragraph or paragraph (1) or an appeal, where the claimant requests that an appeal of which he

has given notice (before referral of the decision under this paragraph) be notified to the Secretary of State, under regulation 31, shall be final."

17. On 10 October 2013 the then Deputy Pensions Ombudsman upheld Dr Y's complaint on the ground that the Authority had failed to consider his request under regulation 32(2) correctly. The Ombudsman, among other things, said:-

- Regulation 37 ('Reassessment of Injury Pension', of The Police (Injury Benefit) Regulations 2006) only allowed a review of whether there had been a change in the degree of the individual's disablement. But the Authority had gone further than that and had reduced Dr Y's pension on the ground that he had unreasonably refused to undergo treatment.
- An individual's disablement and whether it was likely to be permanent were issues that had to be decided at the time of the original injury pension award.
- When considering whether to revise an injury pension, the only question to be considered was whether there had been a change in the degree of the person's disablement. It was not permissible for the 2006 review to consider other issues, such as whether Dr Y had contributed to his disablement through his own default.
- She would have directed the Authority to look again at Dr Y's request for a regulation 32(2) review and decide whether to agree to it. But this had now become unnecessary, as the Authority had agreed to set aside the 2006 decision and reinstate his injury pension at the previous level.
- However, there remained Dr Y's submission that earlier decisions (in particular the 1997 decision) were also wrong.
- If Dr Y considered that earlier decisions were wrong, he could request a regulation 32(2) review of any such decision. While it would be for the Authority to decide whether to agree to that, it should consider any such request in accordance with the guidelines laid down in the case of Haworth. The Court held that there was no time limit for requesting a regulation 32(2) review, it was not lawful to refuse to reconsider on the grounds of delay and it was irrelevant that the claimant could but did not judicially review an earlier decision to reduce their benefits, or would likely fail to obtain permission to judicially review. Whilst those might be relevant issues in considering the underlying merits of the case, they could not be reasons on their own to refuse to reconsider. Regulation 32(2) was a mechanism to correct a mistake which could otherwise not be put right (a regulation 37 review could not do this). What the defendant had to do was consider whether the review in 2006 had been conducted in accordance with regulation 37.

18. Dr Y duly requested the Authority to consider, under regulation 32(2), the reinstatement of Dr Bevan-Jones' 1997 certificate and his entitlement to a disablement gratuity.

19. Following legal advice, the Authority recognised that the recommendation of Dr Bevan-Jones had not been implemented. It therefore reinstated Dr Y's injury pension

at Band 4 (100% permanent disability), with effect from 25 April 1995, on the basis of a diagnosis of PTSD.

20. Dr Y received a back-payment of injury pension "owed to you since April 1995 (further to our previous agreement to reinstate your pension to Band 4 (80%) with effect from October 2006)", plus interest.

21. The Authority said that, as Dr Y had been paid £4,493 at retirement and the same amount again in 1997 (when his injury award was amended from Band 2 to Band 4), he was not entitled to any further gratuity payment.

22. Dr Y again asked the Authority to consider his application for a disablement gratuity. On 10 January 2014, the Authority replied that:-

    - Dr Bevan-Jones' 1997 report did not suggest that he was totally disabled.
    - Whilst it had been able to resolve the issue of the level of his injury award without the need for further medical advice, there was insufficient medical evidence to support payment of a disablement gratuity.
    - Subject to Dr Y's agreement, it proposed to arrange for the SMP to undertake a review as to whether or not within 12 months of August 1994 (when Dr Y's injury occurred), he became totally disabled as defined in regulation 7(6) of The Policy (Injury Benefit) Regulations 2006.

23. Dr Y queried whether the SMP would be asked to decide in the "here-and-now", or to effectively put himself back in time and decide on the facts as they were when he retired. If the latter, he argued that the Regulations did not allow it. If the former, he could not see how they could do other than decide in his favour (based on the evidence of his lasting inability to work and earn as a result of the duty injury).

24. Dr Y referred to the four statutory questions (the same questions appear in regulation 10(3) of The Police Pension Benefit Regulations 1987 and regulation 30(3) of The Police (Injury Benefit) Regulations 2006). These are: whether the person concerned is totally disabled; whether that total disablement is likely to be permanent; whether the disablement is the result of an injury received in the execution of duty; and the date on which the person became totally disabled. He argued that all of these questions had already been answered. He had been assessed as 100% disabled, which was unarguably total disablement, and his disablement was permanent.

25. In May and June 2014, the Authority refused Dr Y's review request. On 17 June 2014, the Authority wrote to Dr Y, as follows:-

    "It is clear that the report by Dr Bevan-Jones does not support the award of a disablement gratuity. It does not state that your earnings capacity has permanently been affected by 100%, it twice states that the assessment of the condition is "at present". That, in my opinion, very clearly counters the suggestion that the earning capacity has been permanently affected by 100%.

> With this in mind, we do not agree with your interpretation of the legislation or indeed your interpretation of Dr Bevan-Jones' decision. We cannot accept therefore that you are entitled to a disablement gratuity."

26. The Authority refused to share the legal advice it had received with Dr Y. However, it said that its decision in response to Dr Y's request for a disablement gratuity was based on a full consideration of his case history and accorded with previous advice that it had given him.

27. Dr Y invoked the Scheme's two-stage internal dispute resolution procedure (**IDRP**). At IDRP stage 1, among other things, he said:-

- His backdated reinstatement at Band 4 (100%) made all other certificates to date null and void.
- As there was no definition of "totally disabled" in The Police (Injury Benefit) Regulations 1987, regulation 3 (2)(b) (of those Regulations) and regulation 13(1) of The Police Pensions Regulations 1973 should be interpreted literally.
- By reference to the literal meaning of Regulation A12(1) of The Police Pensions Regulations 1987 and paragraphs 14 and 15 (actually paragraphs 16 and 17) of Section 3 of Home Office 'Guidance on Police Medical Appeals', Dr Bevan-Jones was correct in the manner in which he assessed his disablement as being permanent.
- Dr Bevan-Jones could only assess the degree of his disablement at the time he made his decision, hence his report stating "he is incapable of working or earning a living at present" and "his earning capacity has been affected by 100% at present".
- While the Authority had correctly made reference to regulation 3(2)(b) of The Police (Injury Benefit) Regulations 1987, it had failed to reference Regulation 10(3) of the same Regulations. When read together, and when read literally, when referring the statutory medical questions to Dr Bevan-Jones for determination of whether his disability was permanent, the then Authority also referred the questions regarding total disablement.
- Permanent disability, in the event that certain conditions apply, may be reviewed under regulation K1 ('Cancellation of ill-health and injury pensions') of The Police Pensions Regulations 1987, and prescribed actions can be taken if the disablement is found to have ceased.
- The Regulations clearly envisage that the decisions in relation to permanent disability can only be properly taken in the here and now and at the time the question arises for decision. Subsequently, circumstances may alter, to the extent that the degree of disablement is changed.
- The Regulations clearly envisage and create the proposition that the decision in relation to the degree of disablement can only be properly taken in the here and now.
- For clarification, Dr Y quoted Regulations 7(1), (2) and (6) of The Police (Injury Benefit) Regulations 2006.

28. The Authority turned down Dr Y's appeal, concluding:-

> "As I see it, Dr Bevan-Jones, in his report of 27 February 1997, did not support the award of disablement gratuity. He stated that you were incapable of working or earning a living "at present" and the degree to which your earning capacity was affected was 100% "at present". In my opinion it clearly does not suggest your earning capacity is permanently affected 100%. I also do not agree with your interpretation of the legislation …"

29. Dr Y proceeded to IDRP stage 2, submitting:-

- Dr Bevan-Jones decided that his disablement was permanent and that the degree of disablement was 100% at that time.
- That decision was final and could not be revisited.
- Under either Regulation 4(1) of The Police (Injury Benefit) Regulations 1987 or Regulation 12 of the current 2006 Regulations, he qualified for a disablement gratuity.
- Dr Bevan-Jones' decision was on the basis of likelihood (based on the evidence before him and with no need to speculate about the future) that he was permanently disabled.
- Whist the degree of disablement may vary in the future, and as a consequence the pension may change, the injury award and additional disablement gratuity, once paid, were not subject to any further attention.

30. The Chief Executive of the Office of the Police and Crime Commissioner for the Authority turned down Dr Y's stage 2 IDRP complaint.

31. Dr Y referred a complaint to us. The complaint was considered by one of our Adjudicators. In summary, the Adjudicator noted that the Authority had not asked Dr Bevan-Jones to consider whether Dr Y was totally and permanently disabled as at 2 August 1995. He therefore concluded that the Authority had failed to properly consider Dr Y for a disablement gratuity.

32. To put matters right, the Adjudicator suggested that the Authority should request a medical report and certification from another SMP, not previously involved, as to whether Dr Y satisfied the criteria for a disablement gratuity as at 2 August 1995 – that is, 12 months after his injury on duty. He further recommended, "in answering this question, the medical evidence considered must have been available at or specifically relate to Dr Y's condition at that time". The Authority was then to decide whether Dr Y was entitled to a disablement gratuity and inform him of its decision.

33. The Authority accepted the Adjudicator's conclusions and obtained an opinion from an SMP, Dr Cheng, as to whether Dr Y satisfied the Scheme criteria for the award of a disablement gratuity as at 2 August 1995.

34. Dr Cheng provided his report to the Authority on 8 October 2015 (please see Appendix 2). Amongst other things, he noted that Dr Y's medical records indicated that his condition fluctuated, that his condition was noted to have improved in July 1994, and that he had been able to challenge the refusal of an injury on duty award with clear reasoning. Dr Cheng's conclusion was that, on the balance of probabilities, Dr Y had capacity for some work on 2 August 1995. On that basis, he did not consider Dr Y met the criteria for the award of a disablement gratuity as at that date.

35. Dr Cheng also commented that the injury on duty award could not be withdrawn, but could be reduced to Band 1.

36. The Authority accepted Dr Cheng's conclusions and rejected Dr Y's application.

37. On 9 October 2015, Dr Y complained to the Authority that his medical records had been sent to Dr Cheng without his consent (Dr Y subsequently complained to the Information Commissioner's Office (**ICO**) about this matter).

38. Amongst other things, Dr Y also criticised Dr Cheng's suggestion that his injury on duty award could be reduced to Band 1, on the basis that this was irrelevant to the question the Authority had asked him to consider. He further pointed out that Dr Cheng had referred to medical reports relating to the period after 2 August 1995. He said evidence about his condition after that date was not relevant to an assessment of whether he could be judged totally and permanently disabled within 12 months of his injury.

39. Due to his dissatisfaction, Dr Y appealed the Authority's decision. In his submissions to the Police Medical Appeal Board (**PMAB**), he pointed out that his wife, and his local Federation, had helped him with his application for the injury on duty award and so his apparent competency in this respect should be disregarded. He also noted that Dr Cheng had not mentioned any employment that he considered he would have been able to hold down as at 2 August 1995.

40. The PMAB issued its decision on 29 March 2016, in which it made the following points:-

> "The evidence concerning whether [Dr Y] was totally disabled as of 2 August 1995 is not absolutely clear. The Board would agree with the SMP that the evidence that ought to be given greatest weight would be evidence that is most contemporaneous to the time period of interest. These appear to indicate that there was some degree of earning capacity, though it is less clear to what extent, on balance of probabilities, any sustained remunerative employment could be obtained. However, the Board consider that this evidence is sufficient to regard him as, on balance of probabilities, not totally disabled as of 2 August 1995.
>
> Leaving aside the issue of whether the disablement was total or not as of 2 August 1995, there is clear evidence to indicate availability of treatment that would have been expected to result in improvement of the appellant's

condition to enable remunerative employment well before compulsory retirement age. The Board is therefore convinced that had the question been asked contemporaneously, an independent medical referee would not have considered him permanently totally disabled".

41. Accordingly, the PMAB rejected Dr Y's appeal.

42. Dr Y wrote a letter of complaint to the Authority on 15 September 2016 making the following points, amongst others:-

- The Adjudicator's Opinion in case 6637 directed it to consider whether he met the criteria for a disablement gratuity as at 2 August 1995, with reference to medical evidence available at, or specifically relating to, his condition at that time. Despite this, the Authority submitted his full occupational health file to Dr Cheng, without obtaining his authorisation. Dr Y referred to the report from the Information Commissioner's Office (**ICO**), which stated:-

"It appears that the whole Occupational Health file was forwarded to Dr Cheng, partially because Mr Sharp [a member of the Authority's staff] did not have access to the file himself. As a result, it is unclear how much of your personal data was disclosed to Dr Cheng in the Occupational Health file and whether this included personal data after August 1995 which did not specifically relate to your condition at that time.

Therefore, I advise TVP to make sure that only limited disclosures are made in these circumstances to ensure that all disclosures of this nature are made in accordance within the first data protection principle. TVP may wish to seek further consent from individuals if it is considering sending further personal data to SMPs which is outside of the terms stated by POS".

- Dr Cheng did not provide him with a copy of his report before sending it to the Authority. As a result, he did not have the opportunity to correct any inaccurate information. For example, Dr Cheng stated that Dr Bevan-Jones carried out a paper review, when in fact he had examined him in person.

- Dr Cheng's report failed to mention that at the time specified in the Adjudicator's Opinion in respect of case PO-6637, he was in receipt of incapacity benefit, indicating he was incapable of work.

43. The Authority considered Dr Y's complaint under the Scheme's IDRP. The stage 1 IDRP decision, issued on 7 December 2016, reached the following findings:-

- The report from the ICO concluded that in agreeing to the Adjudicator's recommendation with respect to case PO-6637, Dr Y had given his consent for his medical records to be disclosed to Dr Cheng.

- The Home Office guidance for SMPs states at paragraph 4.17 that the officer will be provided with a copy of the report; it makes no mention or provision for the officer to have sight of the report prior to submission to the Authority.

- Eligibility for State Incapacity Benefit is determined by reference to different criteria to those that establish eligibility for a disablement gratuity from the Scheme.

44. Dr Y appealed this decision to the Police and Crime Commissioner of Thames Valley Police (**the Commissioner**), under the second stage of the Scheme's IDRP. The Commissioner rejected the appeal on 2 February 2017, for broadly the same reasons.

Adjudicator's Opinion

45. Dr Y's complaint was considered by one of our Adjudicators, who concluded that no further action was required by the Authority. The Adjudicator's findings are summarised briefly below:-

- Whilst Dr Cheng referred to medical evidence dated later than 2 August 1995, the reports in question contain information relating to Dr Y's health as at 2 August 1995. As a result, the Adjudicator did not consider it to be unreasonable that Dr Cheng (and the PMAB) made reference to them.

- In his report, Dr Cheng gave his opinion that, on the balance of probabilities, Dr Y was capable of some work on 2 August 1995 and that, due to this, he did not consider his earning capacity had been 100% affected by his injury on duty. Accordingly, the Adjudicator was satisfied that Dr Cheng had the correct Scheme criteria in mind, notwithstanding that he did not refer directly to them in his report.

- The PMAB referred directly to the correct Scheme criteria for the award of a disablement gratuity.

- The PMAB noted that, according to the contemporaneous medical evidence, there was a considerable improvement in Dr Y's condition in April 1995, then a deterioration, and an improvement again in July 1995. It further noted that various treatments were available in August 1995 which Dr Y had not tried, such as alternative antidepressant medication and Cognitive Behavioural Therapy. In the Adjudicator's view, the PMAB's conclusion that Dr Y was not totally and permanently disabled as at August 1995 follows logically from this evidence. In these circumstances, he could see no reason as to why the Authority should have sought further clarification or departed from the conclusions of the PMAB.

- Although Dr Cheng did not mention Dr Y's award of State Incapacity Benefit, the PMAB recognised that he was receiving this benefit on 2 August 1995. It also explained why it considered that, despite this, it took the view that Dr Y did not

meet the Scheme criteria for the award of a disablement gratuity, as they differed from those governing entitlement to State incapacity benefits.

- Overall, the Adjudicator was satisfied that the Authority followed the correct process and assessed Dr Y's application for a disablement gratuity properly.

Dr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr 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 Dr Y for completeness. In summary, these are:-

- In a previous case determined by the Ombudsman, PO-5477, the applicant complained that Dr Cheng had told her that he never awards 100% disablement. Similarly, in the report he submitted to the Authority with regard to Dr Y's application, Dr Cheng commented that the fact he was able to handle the application and appeal process for his injury on duty award in 1995, suggests that he was not 100% disabled. Dr Y says this shows that Dr Cheng was biased against him, and so his report should be disregarded.

- Dr Cheng's attendance at meetings of bodies such as the National Welfare Engagement Forum (**NWEF**) and its predecessor the National Attendance Management Forum (**NEMF**) further illustrates his bias. This is on the basis that these bodies are composed of representatives of police forces and the Home Office.

  SMPs who serve on PMABs attend, and give presentations to, conferences of the Association of Local Authority Medical Advisers (**ALAMA**). One such presentation was entitled "PMAB: Processes, Key Case Law and Lessons for the SMP". This raises questions as to the independence of SMPs from the Authority and the Scheme.

- Dr Cheng did not provide him with a copy of his report before he sent it to the Authority. This is contrary to British Medical Association (**BMA**) guidelines in its booklet "The Occupational Physician", which are as follows:-

"A formal management request for a report ought always to be in writing. The request should include:

the reason for the referral;

a clear statement of the questions being asked – the names of the persons who will receive the report;

a statement confirming that the actions which may result from the report and the possible implications for the employee have been explained to the employee by the manager making the request;

confirmation that the employee consents to the assessment.

When the employee attends, the relevant member of occupational health staff should satisfy themselves that the above points have been met and that the employee understands the purpose of the consultation.

The written referral shall be shown to the employee on request.

At the end of the consultation, the employee should be informed of the result (or the next steps) and told that no clinical information will be disclosed without their consent.

The employee should be offered sight or a copy of any report that will be sent to their employer. The employee should be told that they have the right to comment on any part of the report that they believe is inaccurate or misleading. Employees should be told that they have a right to withdraw consent having seen a written report".

- Since he did not have sight of Dr Cheng's report prior to its submission to the Authority, he was unable to correct any inaccuracies. He notes that Dr Cheng erroneously referred to Dr Bevan-Jones' report having been produced on the basis of a paper review, when in fact, he had a face to face appointment with him.

- Dr Y referred to a Determination issued by my office in respect of PO-13059, where it was concluded that an occupational health clinician cannot reasonably make a prediction as to a member's future earning capacity. He suggests that this judgment could also be applied to his case, in that Dr Cheng was asked to provide an estimate of past earning capacity.

- The Authority sent his whole file to Dr Cheng, despite the Adjudicator's Opinion in respect of PO-6637 having spelt out that, in assessing his application, "the medical evidence considered must have been available at or specifically relate to Dr Y's condition at [2 August 1995]".

- Amongst the evidence which the Authority sent to Dr Cheng and the PMAB was a report written by Dr Leeming-Latham, which the Authority had previously agreed to set aside. The inclusion of this report may have influenced the decision-making of Dr Cheng and the PMAB.

- Mental health services in his area were poor, but this was not acknowledged by Dr Cheng or the PMAB. They should have done so, because his file included a copy of an article in the Cambrian News highlighting the shortcomings in mental health care in his area going back to 2003.

- In 2007, his General Practitioner indicated that there were no further treatments available on the NHS in his area.

- Dr Cheng erroneously refers to symptoms of anxiety and depression when in fact, he had received a diagnosis of PTSD.

- The decision-maker at IDRP stage 2 was not independent of the decision-maker at IDRP stage 1, since she was the senior manager of the stage 1 decision-maker.

- The Authority did not refer him to its Occupational Health Service before dismissing him on the ground of ill-health.

- He was in receipt of State Incapacity Benefit on 2 August 1995. Since that benefit is awarded for the same purpose as a Scheme disablement gratuity, it follows that he meets the criteria for the gratuity. State Incapacity Benefit payments are subject to regular clinical reviews to determine whether the recipient continues to meet the eligibility criteria. Bearing in mind he was in receipt of Incapacity Benefit on 2 August 1995, the State judged him to be totally incapacitated and, as such, he must satisfy the Scheme's criteria for the award of a disablement gratuity.

Ombudsman's decision

46. In order to determine whether Dr Y was entitled to a disablement gratuity, the Authority was required to reach a judgment as to whether he became *totally* and *permanently* disabled as a result of his injury *within 12 months of receiving the injury*.

47. As relevant, "disablement" is defined in regulation A12(3) of the Police Pensions Regulations 1987 (**the Regulations**; see Appendix 1) as "inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force". The degree of disablement is the extent to which an officer's earning capacity has been affected by the relevant injury.

48. For the purposes of the Regulations, "totally disabled" is defined as meaning the member is "incapable, by reason of the disablement in question, of earning any money in any employment".

49. "Permanently" is not defined in the Regulations. However, guidance issued by the Home Office with respect to medical appeals (under the Police Pension Regulations 1987 and the Police (Injury Benefit) Regulations 2006) defines it as "until at least the compulsory retirement age for his or her rank". This is consistent with *Harris v Shuttleworth* [1994] ICR 991 [1994] IRLR 547.

50. Before reaching a decision, the Authority had to obtain the opinion of an SMP as to whether Dr Y satisfied the above criteria.

51. My role in this matter is to decide if the process followed by the Authority in refusing Dr Y a disablement gratuity was correct and whether the decision reached by the Authority was made properly. It is not to decide whether Dr Y is entitled to a disablement gratuity.

52. Furthermore, when I consider complaints of this nature, it is not for me to replace the decision made by the respondent. I look at whether the decision has been made in

line with the correct Scheme rules and overriding legislation. I also look to see that all relevant evidence has been considered, and that no irrelevant evidence has been taken into account.

53. In the event that I decide that the decision has not been made in the correct manner, I explain why and direct that the decision be made afresh by the decision-maker. Where I find that the correct procedures have been followed, even where I may not agree with the outcome, no directions will be made.

54. Turning to Dr Y's further comments; I note he has referred to a complaint to this Office, PO-5477, where the applicant said Dr Cheng told her that he never awards 100% disablement. He says this reinforces his view of Dr Cheng's bias, in that it suggests he would never recommend a member should receive a disablement gratuity.

55. In the first instance, I should say that the conduct of the medical professionals in reaching their decision is not within my jurisdiction; they are governed by their own professional bodies and codes of conduct.

56. In any case, notwithstanding Dr Y's views on Dr Cheng's conduct, his case was subsequently considered by the PMAB. The evidence does not suggest that there was anything untoward in the conduct of the PMAB which should have been challenged by the Authority. In the circumstances, the Authority was required to accept the PMAB's decision.

57. Also in relation to bias, Dr Y considers the attendance of Dr Cheng, and SMPs who serve on the PMABs, at conferences, and at meetings of the NWEF, calls their impartiality into question. However, I do not consider it is unreasonable for SMPs to attend, and give presentations at, meetings and conferences on topics of relevance to their roles with the Scheme and the Authority. In any case, I note Dr Y has not referred to any of the SMPs who served on the PMAB that reviewed his application. Furthermore, I find no evidence of any bias in the PMAB report.

58. Dr Y has also quoted from a GMC document entitled "The Occupational Physician", which he says contains an obligation on medical professionals to provide a copy of a report to the subject of the report before it is sent to the commissioner of the report. However, this document relates to occupational physicians who have examined a patient face to face. Dr Cheng's report was based on a paper review. Accordingly, I conclude that this document does not support Dr Y's case.

59. Dr Y is also dissatisfied that Dr Cheng did not provide him with a copy of his report before forwarding it to the Authority. As a result, he was unable to make comments and correct errors. He has pointed out that the report records that Dr Bevan-Jones' report, dated 27 February 1997, was based on a paper review, when in fact he had a face to face consultation.

60. I note that the PMAB report accepted that Dr Y had a face to face consultation with Dr Bevan-Jones. It also explained that this fact did not affect its decision, since Dr

Bevan-Jones' assessment "comes several months after the period of interest and clearly relates to the time of his assessment". As a result, I find that the fact Dr Y did not have the opportunity to comment on Dr Cheng's report before it was submitted to the Authority does not help Dr Y's case.

61. With regard to Dr Y's suggestion that the Determination for PO-13059 can be applied to his case; this complaint was made against a different Scheme, with different award criteria. Furthermore, the findings Dr Y refers to relate to the reasonableness of an SMP making conclusions about future earning capacity. On the other hand Dr Cheng, and the PMAB, were asked to reach conclusions as to Dr Y's earning capacity in the past. As a result, I find that the conclusions reached in respect of PO-13059 cannot be applied to Dr Y's case.

62. Dr Y has also complained that the Authority sent his whole occupational health file to Dr Cheng. He submits that this should not have been done, since the Adjudicator who considered PO-6637 said that the SMP should base their decision on medical evidence which was available at, or specifically related to, his condition as at 2 August 1995.

63. The fact that Dr Cheng's report (and that of the PMAB) refer to medical evidence from after 2 August 1995 confirms that the Authority provided the medical advisers with information produced after that date. However, some of this evidence relates to Dr Y's condition as at 2 August 1995, and as such, it is relevant to the Adjudicator's recommendation in his Opinion for PO-6637. For example, Dr Edwards' report dated 15 March 1996 noted that:-

> "On **8 June 1995** [my emphasis] it is noted that [Dr Y] had stopped taking Lofepramine two months previously but he had then experienced an increase in anxiety with disturbance of sleep (waking at 4am), tearfulness and diminution in appetite and libido. "Endogenous depression" was diagnosed and he was started back on Lofepramine".

64. Furthermore, the substantive discussion in the PMAB report is limited to an assessment of Dr Y's condition as at 2 August 1995. Accordingly, I do not consider there is evidence that irrelevant evidence, relating to Dr Y's condition after 2 August 1995, impacted the PMAB's decision-making.

65. Moreover, the Authority's letter of instruction to Dr Cheng read as follows:-

> "TVP have agreed to follow the recommendation of the Ombudsman with regard to the following:
>
> *Request a medical report and certification from another SMP (not previously involved) as to whether Dr Y satisfied the criteria for a disablement gratuity as at 2 August 1995. In answering this question, the medical evidence considered must have been available at or specifically relate to Dr Y's condition at that time*".

66. As such, I am satisfied that it was made clear to Dr Cheng that the medical evidence considered must have been available at, or specifically relate to, Dr Y's condition as at 2 August 1995. Furthermore, the PMAB report notes that, in determining whether Dr Y met the criteria, "the medical evidence considered must have been available at, or specifically relate to, Dr Y's condition at that time [2 August 1995]". It is therefore apparent that the Authority asked Dr Cheng, and the PMAB, to consider Dr Y's application in accordance with the Adjudicator's recommendation in respect of PO-6637.

67. A further complaint made by Dr Y is that the PMAB report makes reference to a review by Dr Leeming-Latham, which the Authority had previously agreed to set aside. Whilst Dr Leeming-Latham's report was referred to in the PMAB report, this was under the heading "Submissions by the Appellant and Representatives". Accordingly, I find that the PMAB was simply summarising the evidence submitted by Dr Y and his representatives. There is no reference to Dr Leeming-Latham's report in the section entitled "Detailed Case Discussion", which is where the PMAB weighs up the substantive evidence. Accordingly, I conclude that the evidence does not support Dr Y's argument that the PMAB erroneously took Dr Leeming-Latham's report into account when it reached its decision.

68. Dr Y also complains that the PMAB did not acknowledge that there was an article in Cambrian News highlighting shortcomings in mental health services in his area going back to 2003. A further complaint is that neither Dr Cheng, nor the PMAB, acknowledged that in 2007, his GP had said no further treatments were available in his area. However, these points relate to dates after 2 August 1995. They are therefore not relevant to any consideration of whether Dr Y met the criteria for the award of a disablement gratuity at that date.

69. Another concern that Dr Y has raised is that Dr Cheng refers throughout his report to a diagnosis of anxiety and depression when, in fact, he was given a diagnosis of PTSD. However, the PMAB report refers to PTSD; and some of the other medical reports relied upon refer to both PTSD and anxiety/depression. As a result, I am unable to conclude that Dr Y's comments in this regard call the validity of the conclusions reached by Dr Cheng or the PMAB into question.

70. Turning to Dr Y's suggestion that the decision-maker at IDRP stage 2 was not independent of the decision-maker at IDRP stage 1; this has no bearing on the validity of the medical evidence relied on by the Authority. As such, it is irrelevant to the subject of the complaint, which is the Authority's refusal to grant Dr Y a disablement gratuity.

71. Another concern Dr Y has raised is that the Authority did not refer him to its Occupational Health service before taking the decision to retire him on ill-health grounds. This is an employment issue and, as such, it is not within my jurisdiction.

72. Dr Y makes the point that he was in receipt of State Incapacity Benefit on 2 August 1995. He submits that this State benefit is awarded for the same purpose as a Scheme disablement gratuity, and so he must be eligible for the latter.

73. However, as Dr Y recognises in his further comments, State Incapacity Benefit payments are subject to regular clinical reviews to determine whether the recipient continues to meet the eligibility criteria. On the other hand, the Scheme criteria for the award of a disablement gratuity require evidence that the disablement has become permanent within 12 months of the date of the injury on duty (in Dr Y's case, 2 August 1995); and there is no provision for a review. As such, the eligibility criteria for the two benefits are different. Accordingly, I find that the fact Dr Y was in receipt of State Incapacity Benefit on 2 August 1995 does not help his case.

74. Therefore, I do not uphold Dr Y's complaint.

Karen Johnston

Deputy Pensions Ombudsman
7 February 2018

Appendix 1

The Police (Injury Benefit) Regulations 1987

75. As relevant, provisions 3 and 4 say:-

> **"3.**—(1) Subject to the following provisions of these Regulations, these Regulations shall be construed as one with the Police Pensions Regulations 1973(**1**) (hereinafter referred to as "the principal Regulations").
>
> (2) Without prejudice to paragraph (1)—
>
> (a)in these Regulations—
>
> …
>
> (iii)notwithstanding Regulation 13(3) of the principal Regulations, "totally disabled" means incapable by reason of the disablement in question of earning any money in any employment and "total disablement" shall be construed accordingly; and
>
> (b)in the case of a person who is totally disabled, Regulation 13(1) of the principal Regulations shall have effect, for the purposes of these Regulations, as if the reference to "that disablement being ... ... likely to be permanent" were a reference to the total disablement of that person being likely to be permanent.
>
> **Disablement gratuity**
>
> **4.**—(1) This Regulation shall apply to a person who—
>
> (a)receives or received an injury without his own default in the execution of his duty, whether before, on or after 25 November 1982; and
>
> (b)on or after that date ceases or has ceased to be a member of a police force; and
>
> (c)on or after that date and within 12 months of so receiving that injury, becomes or became totally and permanently disabled as a result thereof.
>
> (2) Subject to the following provisions of these Regulations, the police authority for the force in which a person to whom this Regulation applies last served shall pay to him a gratuity of an amount equal to whichever is the lesser of the following amounts, namely—
>
> (a)five times the annual value of his pensionable pay on his last day of service as a member of a police force;
>
> (b)the sum of four times his total remuneration during the 12 months ending with his last day of service as a member of a police force and the amount of

his aggregate pension contributions in respect of the relevant period of service."

76. Regulation 10 (3) says:

"Without prejudice to the foregoing, Part VIII of the principal Regulations (determination of questions) shall apply for the purposes of determining eligibility for awards under these Regulations as it applies to the determination of questions under those Regulations, and as if the questions to be referred by the police authority to a duly qualified medical practitioner under Regulation 71(2) of those Regulations were the following—

(a)whether the person concerned is totally disabled;

(b)whether that total disablement is likely to be permanent;

(c)whether the disablement is the result of an injury received in the execution of duty; and

(d)the date on which the person became totally disabled."

77. The Police (Injury Benefit) Regulations 1987 and Regulation B4 of The Police Pension Regulations 1987 were replaced by The Police (Injury Benefit) Regulations 2006.

The Police (Injury Benefit) Regulations 2006

78. As relevant, Regulation 7 ("Disablement") says:-

"(1)Subject to paragraph (2), a reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent.

(2)In the case of a person who is totally disabled, paragraph (1) shall have effect, for the purposes of regulations 12 and 21 of these Regulations, as if the reference to "that disablement being at that time likely to be permanent" were a reference to the total disablement of that person being likely to be permanent.

(3)For the purposes of deciding if a person's disablement is likely to be permanent, that person shall be assumed to receive normal appropriate medical treatment for his disablement, and in this paragraph "appropriate medical treatment" shall not include medical treatment that it is reasonable in the opinion of the police pension authority for that person to refuse.

(4)Subject to paragraph (5), disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force…

(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:

Provided that a person shall be deemed to be totally disabled if, as a result of such an injury, he is receiving treatment as an in-patient at a hospital.

(6)Notwithstanding paragraph (5), "totally disabled" means incapable by reason of the disablement in question of earning any money in any employment and "total disablement" shall be construed accordingly.

…

(8)In this regulation, "infirmity" means a disease, injury or medical condition, and includes a mental disorder, injury or condition."

79. Regulation 12(1) ("Disablement gratuity") says:-

"(1)This regulation applies to a person who-

(a)receives or received an injury without his own default in the execution of his duty,

(b)ceases or has ceased to be a member of a police force, and

(c)within 12 months of so receiving that injury, becomes or became totally and permanently disabled as a result of that injury."

80. As relevant, Regulation 30 ("Reference of Medical Questions") says:-

" (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,

…

(3) Where the police authority are considering eligibility for an award under regulation 12, paragraph (2) shall have effect as if the questions to be referred by them to a duly qualified medical practitioner were the following—

(a)whether the person concerned is totally disabled;

(b)whether that total disablement is likely to be permanent;

(c)whether the disablement is the result of an injury received in the execution of duty; and

(d)the date on which the person became totally disabled.”

Appendix 2 (medical evidence)

81. Dr Cheng, in a report dated 8 October 2015 for the Authority, stated:-

> "Based on the documents provided, the following is noteworthy:
>
> According to the assessment of Dr C Howard (Consultant Psychiatrist) on 13/9/95 and the report dated 16/10/95, "his medical records indicated that there had been considerable improvement in April 1995, when it had been decided that he had been leaving the police force. However, by June his condition had worsened again and it was necessary to resume anti-depressant medication. In July his condition was noted to be improved".
>
> According to the assessment of Dr H Edwards (Consultant Psychiatrist) on 8/3/96 and the report dated 15/3/96, "On 8 June 1995 it is noted that he had stopped taking Lofepramine two months previously but he had then experienced an increase in anxiety with disturbance of sleep (waking at 4am), tearfulness and diminution in appetite and libido. "Endogenous depression" was diagnosed and he was started back on Lofepramine".
>
> During March 1995, he demonstrated competent capability in dealing with his application for ill-health retirement and challenging the refusal for Injury-on-Duty award with clear rationale.
>
> During July 1996, he demonstrated competent capability in dealing with his challenge of granting 35% for his Injury-on-Duty award.
>
> On balance of probability, he had capability for some work at 2/8/95 and it cannot therefore be considered that his earning capacity has been 100% affected by his "Injury-on-Duty".
>
> It is acknowledged that the Injury-on-Duty award cannot be withdrawn although it can be reduced to Band 1. It would appear that the initial refusal for Injury-on-Duty is correct because stress relating to workplace appraisal or police investigation relating to disciplinary matters does not qualify for an Injury-on-Duty award.
>
> In summary, he does not satisfy the criteria for a disablement gratuity as at 2/8/95".

82. On 29 March 2016, the PMAB report stated, under the heading Detailed Case Discussion:-

> "The Board has carefully considered the evidence before it. The Board's understanding of the above Regulation is that it first needs to determine whether, as of 2 August 1995, Dr Y was totally disabled. Total disablement here means a 100% loss of earning capacity. The Board also needs to consider whether, based on medical evidence available as of that date, or that specifically relate to that time period, such total disablement was permanent.

The evidence concerning whether he was totally disabled as of 2 August 1995 is not absolutely clear. The Board would agree with the SMP that the evidence that ought to be given greatest weight would be evidence that is most contemporaneous to the time period of interest. These appear to indicate that there was some degree of earning capacity, though it is less clear to what extent, on balance of probabilities, any sustained remunerative employment could be obtained. However, the Board consider that this evidence is sufficient to regard him as, on balance of probabilities, not totally disabled as of 2 August 1995.

Leaving aside the issue of whether the disablement was total or not as of 2 August 1995, there is clear evidence to indicate availability of treatment that would have been expected to result in improvement of the appellant's condition to enable remunerative employment well before compulsory retirement age. The Board is therefore convinced that, had the question been asked contemporaneously, an independent medical referee would not have considered him permanently totally disabled. The subsequent questions of whether total disablement is the result of an injury received in execution of duty and date on which the person became totally disabled become academic

…

It is worth noting that Dr Bevan-Jones' assessment comes several months after the period of interest and clearly relates to the time of his assessment.

Thus the Board has to conclude that based on medical evidence available as of 2 August 1995, or specifically relating to Dr Y's condition at that time, he cannot be considered to be totally and permanently disabled …

The Board unanimously conclude that Dr Y is not entitled to a disablement gratuity."