

Ombudsman's Determination

Applicant	Mr N
Scheme	Police Injury Benefit Scheme (the Scheme)
Respondent	Kent Police (KP)

Outcome

1. Mr N's complaint is upheld and to put matters right KP shall reconsider Mr N's application.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N's complaint against KP concerns its decision to refuse to award him an injury benefit entitlement.

Background information, including submissions from the parties

4. Mr N's injury on duty award is regulated by the Police Injury Benefit Regulations 2006 (**the Regulations**), of which the relevant sections are set out in the Appendix.
5. Mr N worked for KP in various roles since 1993. Mr N has a number of health conditions that include non-insulin dependent diabetes mellitus, hypertension, morbid obesity and osteopenia. As a result, Mr N has been on long-term restricted duties due to his hypertension since 2004.
6. On 10 July 2015, Mr N was declared unfit by Occupational Health (**OH**) to undergo officer safety training.
7. On 13 July 2015, Mr N was taking a short cut over a low fence whilst going to a supermarket. He tripped and fell injuring his right arm and left shoulder.
8. In July 2015, KP referred Mr N to an OH consultant, Dr Cheng. In his report, dated 25 July 2015, Dr Cheng concluded that:

"Having taken a careful history and clinically assessed him, I conclude that he is permanently disabled from performing the ordinary duties of a police

officer...He should be able to work full-time, in a sedentary role outside the police with appropriate adjustments, supportive monitoring and supervision.”

9. On 31 March 2016, as a result of his injury, Mr N retired from service and subsequently applied for an injury on duty award.
10. On 26 July 2016, KP sent Mr N a letter that enclosed the report from Dr Cheng and added that:

“You will see he has determined you are permanently disabled and not being able to undertake the full range of capabilities of an ordinary police officer. If you disagree with his assessment, you have 28 days to appeal. The provision for an injury award is set out in regulation 11 of the Police (Injury Benefit) Regulations 2006...Please note no further action will be taken until the expiration of 28 days unless you wish to confirm to me you are happy to waive the right to 28 days’ notice. At that time Dr Cheng will then advise me of whether your injury on duty application is successful.”

11. Mr N was referred back to Dr Cheng, now acting as a Selected Medical Practitioner (**SMP**), for an assessment. In his report, dated 1 August 2018, Dr Cheng concluded that:

“Having carefully reviewed all the documents available, and mindful that the injury sustained was the result of him choosing to hurdle over the wooden barrier on the way to buy refreshment (Health and Safety issue) which was not part of policing required at that time. I conclude that he does not qualify for an Injury-on-Duty award.”

12. On 31 August 2016, Mr N’s representative appealed against the SMP’s view. He contended that:

“The issue is in my view relatively simple Dr Cheng seems to suggest that he was not carrying out his duties as an officer. He doesn’t have to be as he is clearly on duty. That is sufficient. -6(2) a: “The member concerned received the injury while on duty or while on a journey necessary to enable him to report for duty or return home after duty,...”

13. On the same day, KP refused to review Mr N’s case.
14. In September 2016, Mr N appealed further to the Police Medical Appeal Board (**PMAB**).

Mr N’s position:-

- Dr Cheng’s final statement regarding an injury on duty award wrongly stated that the injury was a health and safety issue therefore he applied the test incorrectly.
- The question Dr Cheng should have considered was whether there was any evidence of culpable neglect.

- Mr N was on duty and a refreshment break is allowed within the Police Pension Regulations therefore he was entitled to an injury on duty award.
- Mr N referred to the definition of “execution of duty”. This means an injury is received in the execution of duty if the member concerned receives the injury whilst on duty, while on a journey necessary to enable him to report for duty or to return home after duty.

15. On 9 January 2017, the PMAB issued a report that rejected Mr N's appeal.

The PMAB's position:-

- There was some disagreement as to how Mr N could be fully operational if he had not passed his officer safety training. He had been able to pass the theoretical part of the training even though he had not been physically able to do it.
- Mr N was not receiving any treatment for osteopenia and he disputed that he was suffering from it which was at odds with his medical records.
- Mr N was on restricted operational duties due to raised blood pressure and completed his last officer safety training in 2004.
- Mr N returned to a full non-operational role after the index injury occurred.
- Mr N was not executing his duty rather he was undertaking an unsafe act, the action of his own choice.
- The case law in relationship to default is different to this case, in that the individual was actually taking part in a policing activity unlike Mr N.
- Mr N could have used a proper entrance rather than go over the fence, especially knowing that he had health issues.
- *Doubtfire v Williams* [2010] found it must first determine if there is a disablement and whether that disablement is permanent, before going on to address whether the disablement is the result of an injury in the execution of duty.
- It is the osteopenia that leaves Mr N vulnerable to develop fractures on exposure to minor trauma.
- In *Sharp v West Yorkshire Chief Constable* [2016], it was found that a vulnerability to develop a medical condition can result in a permanent disablement. It is most unlikely that Mr N would have suffered the three fractures had it not been for his osteopenia, compounded by his obesity.
- Although there is no dispute that the fracture to his right arm and shoulder occurred during a period of duty, it is not permanently disabling, the issue of an injury on duty award does not arise. PMAB disagreed with a SMP's opinion with regard to a permanent condition affecting Mr N's right arm and shoulder.

16. In March 2017, Mr N further appealed against the PMAB's decision by saying that:

"After surgery and reconstruction, I am unable to straighten my right arm. Injury to my left shoulder does not allow me to raise my arm above the horizontal...In the meantime the DWP agreed that I was disabled by an Injury at work and awarded the appropriate pension...However the SMP made an uninformed decision that I was not on duty. This flies directly in the face of the regulation [Regulation 6(2)(a)]."

17. On 25 May 2017, KP sent a letter to Mr N in response to his comments. It said that it believed that there was no need to revisit his case as the PMAB considered it very thoroughly taking account of all Mr N's medical evidence and conducting its own clinical examination before reaching its conclusions.

18. On 11 June 2017, Mr N provided further comments to KP referring to his recent bone density scan which showed marginal osteopenia in his right hip not his arms. He also contended that there was no requirement to be exercising a constabulary duty when the injury occurred and there was plenty of caselaw to support it.

19. In October 2017, Mr N brought the complaint to this Office.

20. On 29 November 2017, KP sent a letter to Mr N saying that:

"I enclose a copy of the statutory instrument no 649 2008. The instrument exempts the use of the Internal Dispute Resolution Procedure in medical cases that have been subject to the police pension regulatory appeal process."

21. On 5 March 2018, KP sent this Office a formal response that maintained its previous stance and added that:

"For the avoidance of any doubt, notwithstanding the response included in Mr N's paperwork, the Pension Authority does not contest that he was on duty...The issue is rather one of the "execution of duty" and/or negligence... In my capacity as Pension Board Chair, I have always sought to ensure that the application of regulations (a) passes a reasonableness test; and (b) is seen as credible to the offence, but I ask myself what the ordinary member of the public would think if an individual were given an enhanced injury on duty award on top of pension in order to compensate for a trip whilst taking a short-cut to purchase one's lunch."

Adjudicator's Opinion

22. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by Kent Police. The Adjudicator's findings are summarised below:-

- KP needed to consider Mr N's injury on duty application in line with the Scheme's regulations and properly explain why his application either can or cannot be approved.
 - Essentially, in order to be entitled for an injury on duty award, a member must meet two criteria under the Scheme's regulations. Regulation 11 sets out the two criteria of the eligibility test; (a) an injury received in the execution of the individual's duties and (b) there must be no default on his part. Then Regulation 6(2) and (4) explains what each element actually means for the purposes of the Regulations where in "the execution of duty" means "on duty" and "without his own default" means unless it is "due to his own serious and culpable negligence or misconduct".
 - In his report, Dr Cheng concluded that Mr N chose "to hurdle over the wooden barrier on the way to buy refreshment (Health and Safety issue) which was not part of policing required at that time"; hence he did not qualify for the award. In the Adjudicator's view Dr Cheng did not apply the eligibility test correctly as the right question should have been whether Mr N received an injury whilst being on duty and not whether he was executing his duty. The second criterion under the test is for KP to consider which is whether Mr N's injury is received without his own default unless the injury was mainly due to Mr N's own serious and culpable negligence or misconduct. Once Mr N has passed both criteria only then he would qualify for the award however, it is for KP to make that decision.
 - In the Adjudicator's view the SMP and subsequently KP had not properly considered Mr N's application for an injury on duty award. Consequently, as KP relied on the flawed SMP's report, its decision was improperly made.
 - It is also unclear why KP did not allow Mr N to make an appeal against its decision. It could have agreed to allow him to make an appeal under Regulation 32(2) by referring "any final decision of a medical authority who has given such a decision to him, or as the case may be, for reconsideration...". Given that Dr Cheng incorrectly interpreted the regulations and the question of permanence had only been raised by the PMAB, in the Adjudicator's view, such agreement to an appeal would have been appropriate.
 - The Adjudicator also believed that as the whole process must have caused Mr N significant distress and inconvenience he should receive a £500 award in recognition of the significant distress and inconvenience suffered. The Adjudicator's view was that Mr N's complaint should be upheld.
23. KP did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. KP provided its 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 KP for completeness.

24. KP disagrees with the Adjudicator's interpretation with regard to which Regulation should apply to Mr N's application. It referred to Regulation 30(2) as being the right one however it did not address Regulation 11 and Regulation 6(2) and (4), at all. KP says that Regulation 30(2) clearly requires any disablement as a result of an injury to occur whilst in execution of duty and not simply on duty.

Ombudsman's decision

25. My role in connection with this case is to establish if the process followed by KP in reviewing Mr N's injury benefit award was correct and whether the decision reached by KP was made properly. It is not to decide whether such an award should be made or the level of injury benefit award that was appropriate to Mr N's circumstances.
26. Under regulation 30(1), it is for KP to determine whether Mr N is entitled to an award. However, it is required to refer Mr N's case to the SMP, under regulation 30(2). Relevant sections of Regulation 30(1) and 30(2) are set out in the Appendix. The SMP is required to determine four specific medical questions:-
- Whether Mr N is disabled;
 - Whether his disablement is likely to be permanent;
 - Whether his disablement is the result of an injury received in the execution of duty; and
 - The degree of his disablement.
27. I find that Dr Cheng failed to address the above questions properly when considering Mr N's application. In particular, he failed to properly address the question of whether Mr N's disablement was the result of an injury received in the execution of duty. He did so because he did not interpret the phrase "in the execution of duty" in line with regulation 6(2). Regulation 6(2) provides that "For the purposes of these Regulations an injury shall be treated as received by a person in the execution of his duty as a constable if ... (a) the member concerned **received the injury while on duty**" (my emphasis).
28. KP and Dr Cheng seem to believe that Mr N should have been executing or performing an actual duty rather than being on duty. KP and Dr Cheng failed to consider the definition of "the execution of duty" which refers to being "on duty". The first matter for KP to clarify was whether or not Mr N was "on duty" when he sustained his injury. In other words, was Mr N still on duty whilst on his lunch break? If he was, he would satisfy the definition of "in the execution of duty."
29. Once the first criterion has been applied by the SMP, KP could have then considered whether Mr N's injury was "received without his own default". Again, regulation 6 defines what this means. KP could have considered whether Mr N's actions were "due to his own serious and culpable negligence or misconduct".

30. KP has explained that it applies a “reasonableness test” and asks itself what an ordinary member of the public might think of the outcome. This is not the approach it is required to take in considering Mr N’s case. I have some sympathy for KP’s dilemma; in as much as they may be reluctant to award an injury benefit when the injury has been sustained in such circumstances. However, KP and the SMP are required to apply the regulations as they stand; not as they might wish they were written. They have failed to have regard for the specific definition of “the execution of duty” set out in regulation 6(2). Their concern appears to be that Mr N’s actions contributed to him receiving the injury. If that is the case, it is more properly addressed by considering whether the injury was due to serious and culpable negligence or misconduct.
31. Although regulation 30(6) provides for the SMP’s decision to be final, it would not be appropriate for a police authority to proceed on the basis of a decision which had been incorrectly arrived at. KP should have picked up on the fact that Dr Cheng had misinterpreted the regulations. Instead, it was left to Mr N to appeal his decision.
32. The PMAB then declined Mr N’s appeal on the grounds that his disablement was not permanent. It disagreed with Dr Cheng’s view on the question of permanence. This left Mr N in the position of having his application declined on a different basis at each stage of the process and no immediate appeal option. The one option which was open to him was to have the matter referred back to Dr Cheng under regulation 32(2). This requires KP’s agreement.
33. I find that KP failed to consider agreeing with Mr N to refer his case back to the SMP under Regulation 32(2). The Courts have previously determined that regulation 32(2) is a mechanism by which mistakes as to fact or law may be corrected¹. Given that Dr Cheng had reached his decision under a mistaken view of the regulations, I find that a referral under regulation 32(2) would have been appropriate.
34. Therefore, I uphold Mr N’s complaint and that the case is to be remitted back to KP to reconsider afresh.

Directions

35. Within 28 days, KP shall agree to refer Mr N’s case back to Dr Cheng under the provisions of regulation 32(2). It shall draw his attention to the definition of injury on duty under Regulation 6(2) and clarify whether or not Mr N was on duty at the time he sustained the injury.
36. On receipt of Dr Cheng’s report, KP shall, within a further 21 days, consider whether Mr N’s injury was received without his own default, as defined in regulation 6(4).

¹ *Haworth, R (on the application of) v Northumbria Police Authority* [2012] EWHC 1225 (Admin)

37. KP shall then inform Mr N of the decision in writing and explain its reasoning.

Anthony Arter

Pensions Ombudsman
25 October 2018

Appendix

6 Injury received in the execution of duty

(1) A reference in these Regulations to an injury received in the execution of duty by a member of a police force means an injury received in the execution of that person's duty as a constable and, where the person concerned is an auxiliary policeman, during a period of active service as such.

(2) For the purposes of these Regulations an injury shall be treated as received by a person in the execution of his duty as a constable if —

(a) the member concerned received the injury while on duty or while on a journey necessary to enable him to report for duty or return home after duty, or

(b) he would not have received the injury had he not been known to be a constable, or

(c) the police pension authority are of the opinion that the preceding condition may be satisfied and that the injury should be treated as one received in the execution of duty or...

(4) For the purposes of these Regulations an injury shall be treated as received without the default of the member concerned unless the injury is wholly or mainly due to his own serious and culpable negligence or misconduct.

11 Police officer's injury award

(1) This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in the execution of his duty (in Schedule 3 referred to as the "relevant injury").

(2) A person to whom this regulation applies shall be entitled to a gratuity and, in addition, to an injury pension, in both cases calculated in accordance with Schedule 3; but payment of an injury pension shall be subject to the provisions of paragraph 5 of that Schedule and, where the person concerned ceased to serve before becoming disabled, no payment shall be made on account of the pension in respect of any period before he became disabled.

32 Further reference to medical authority

(2) 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.

30 Reference of medical questions

(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 pension authority.

(2) Subject to paragraph (3), where the police pension 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 ...;

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;

...