

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mr Trevor Hughes
Scheme	Police Pension Scheme (the Scheme)
Respondent(s)	West Yorkshire Police Authority (WYPA)

Subject

Mr Hughes' complaint against WYPA, the Scheme's administrating authority is about their review of his injury benefit award.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against WYPA because:

- WYPA failed to provide adequate information to Mr Hughes about the possibility that his injury benefit might be reviewed; and failed to consider correctly a request for a further review.

DETAILED DETERMINATION

Material Facts

1. The Scheme provides for injury benefit award payments at different levels (or "Bands") dependent on the degree of loss of earnings capacity. The benefit payable may be adjusted to take account of the extent to which the incapacity is attributable to an injury received in the execution of duty.
2. Mr Hughes was retired from WYPA on 14 August 1989 on the grounds of ill health and was granted an ill-health retirement pension and an injury benefit award under the Police (Injury Benefit) Regulations 1987 (as amended) in 1989. The selected medical practitioner, (**SMP**) determined that the degree to which Mr Hughes' earning capacity had been affected was 30% (Band 2).
3. The disabling condition was given as "traumatic damage L Knee".
4. Mr Hughes signed an Injury Pension form on 15 May 1989. The section of the form headed, Compulsory Retirement said,
 5. Mr Hughes' injury benefit award was reviewed by WYPA in April 2009. By this time, the 1987 Regulations had been succeeded by the Police (Injury Benefit) Regulations 2006 (**the Regulations**).
 6. WYPA wrote to Mr Hughes on 27 April 2009 saying,

"I claim the appropriate .../injury awards in accordance with the provisions of the Police Pensions Regulations".

" The Home office in accordance with HOC 46/2004 (copy enclosed) have written to all Police Authorities saying that once a retired officer reaches the age of 65yrs, their earning capacity is nil as they have reached state retirement age.

The legal advice received is that Home Office Circular 45/2004 is likely to be viewed by a court as a permissible interpretation of the Regulations.

The Police Authority would have explained to you that you will be reduced unless there are cogent reasons for not doing so. It is open to the different Police Authorities to take a different view of what amount to cogent reasons and you should not be optimistic about the impact any such reasons will have upon your Police Authority.

The legal advice we have received indicates that the phrase "cogent reasons" is very likely to be interpreted as meaning

reasons for thinking that you would have carried on earning after age 65 had it not been for the injury...”

7. WYPA wrote to Mr Hughes again on 26 May 2009 and 13 July 2009 informing him that his injury benefit award was to be reviewed.
8. WYPA referred Mr Hughes’ case to their medical adviser who in his report of 23 November 2009 determined that his injury benefit award should be 0% (Band I). He noted that Mr Hughes had refused to provide consent for release of medical records and the review was therefore done on the basis of such information as was available. It was his opinion there was no medical evidence to support the current level of award.
9. Mr Hughes subsequently lodged an appeal against the decision to award him 0% (Band I). Mr Hughes initially refused to provide WYPA with details of his medical records and employment details but said that he was willing to undergo a medical examination. WYPA asked him to sign a consent form to release his medical records. In February 2012, WYPA advised him that, despite sending three letters to him, there had been no response. The final letter had warned him that, in the absence of a response, it would be assumed that he had no cogent reasons to put forward and his award would be reduced to the lowest band. As nothing was received, the SMP was asked to consider the case under regulation 33.
10. Mr Hughes was working as a caretaker but declined to provide any information to WYPA about his employment or earnings.
11. The letter also said that his award was paid in relation to his earning capacity, which was not the same as his actual earnings. But if he provided details of his work it would have helped provide an insight into the type of work he was capable of undertaking.
12. Mr Hughes was then examined by Dr Nightingale, the Force Medical Adviser.
13. WYPA wrote to Mr Hughes on 3 August 2010 saying that Dr Nightingale had advised that she was not able to make an informed decision without Mr Hughes’ medical records. This has been discussed with him during his medical examination. WYPA asked Mr Hughes for his consent to provide medical and employment details.
14. Mr Hughes wrote to WYPA on 20 August 2010 consenting to the release of his medical records and providing some information in relation to his employment.

15. A final review of his case was then undertaken by Dr Senior in March 2011. Dr Senior determined that Mr Hughes' degree of disablement was assessed as Band 1. Her report considered his caretaker role, as well as other roles that he might be able to undertake, including a porter driver and a station operator, and concluded that he was capable of working as a business support assistant or HR clerical role.
16. WYPA wrote to Mr Hughes on 18 March 2011 saying that Dr Senior reported that that she could not find any medical evidence to suggest that there was any impact on his working capability.
17. Mr Hughes' case was referred to the Police Medical Appeal Board (**PMAB**) in April 2011. WYPA wrote to Mr Hughes on 20 April 2011 saying,

“I note that you want to continue with your appeal and have requested sight of certain documents. The evidence that we will be submitting to the appeal board will be available within our submission that is sent to both you and the board 35 days prior to the appeal ...

The initial IUE review undertaken was commenced following release of the Home Office Circular 46/2004. However, following recent legal decisions, we have changed the process for those over 65 years old and all reviews are now done in accordance with the Police Injury Benefit Regulations 2006.

I also enclose Appeal Form C which you should use to compile your submission to the appeal board...

Your submission, including any supporting document should be forwarded to the board chair...”
18. The PMAB Administration Manager wrote to Mr Hughes on 6 June 2011 confirming that the date of the hearing was 27 July 2011 and the cut off dates for the submission of written documents.
19. Mr Hughes completed Appeal Form C on 10 June 2011 in which he set out the grounds of his appeal.
20. In its submissions, WYPA said there was no medical evidence to suggest there were any residual working restrictions in relation to the qualifying injury. They provided detailed information about the earnings capacity assessment, including new roles identified as suitable comparators and noted that his expected earnings capacity had changed. Details of a number of specific roles were provided.

21. The PMAB reviewed Mr Hughes' case and issued their report on 8 August 2011.

The writer of the report said,

“During the appeal hearing the appellant consented to an examination.

Case Discussion

The key issue for the Board to address is whether or not Mr Hughes' degree of disablement has altered since the previous assessment.

Relevant legislation

The Police (Injury Benefit) Regulations 2006 make provision for determining a retired officer's degree of disablement.

Detailed Case Discussion

The Board has carefully considered all of the evidence available to it, including the documents submitted, the representations made to it by the appellant and the Respondent...

On the basis of the evidence the Board is of the view that Mr Hughes' degree of disablement since the previous assessment has altered by virtue of:

1. a change in skills
2. change in external factor e.g. ASHE figure/comparator figure

...the fact that the comparator is...the National Average Earnings (and that the most appropriate ASHE figure to use would be the median figure for the over 65 age group)
...means ... there would be a significant reduction in his degree of disablement figure.

Determination of the Board

As a result of these changes the Board's assessment is that since the last review the degree to which Mr Hughes' earning capacity has been affected by the relevant injury has altered and accordingly assess his current degree of disablement as Band 1”.

22. Mr Hughes wrote to WYPA on 28 August 2012 requesting that they reinstate his injury benefit award to its original level. He said that the decision to reduce it was taken in conjunction with HMO Circular 46/2004.

23. WYPA wrote to Mr Hughes on 20 September 2012 saying ,

“Although a decision has been taken to reinstate all IUE awards that were recently reduced in accordance with Home Office Circular 46/2004 I must advise you that this does not apply to your case. Upon reviewing your file I have noted that, although we originally intended to act upon the advice in this circular, your award was reduced in accordance with Regulation 33. This is because you did not submit yourself to medical examination as deemed necessary by the medical authority. Failure to submit yourself can also include, but is not limited to, failure to provide the relevant medical records for review.

Therefore, the last assessment of your award was done in accordance with the Regulations and cannot be overturned at this stage. I note that you did submit an appeal against this decision but again, the Home Office Circular was not applied...”

24. WYPA wrote to Mr Hughes on 20 June 2013 saying,

“Your request to reinstate your award to Band 2 has been reviewed in light of the points raised in your letter. I can confirm that we have reviewed the assessments of Dr Hynes and Dr Senior ...These decisions were superseded by the decision of the PMAB. In accordance with the Regulations, any decision made by the PMAB is final and therefore, it is that decision that applies to the present pension award level ...The PMAB made a detailed assessment of your degree of disablement and were of the view that there had been material changes that altered your earning capacity.”

25. The letter concluded that the PMAB’s decision was final and “we must abide by this. Therefore, on this particular occasion we cannot reinstate your pension for the reasons provided.”

Scheme Provisions

26. The Scheme is governed by the Police (Injury Benefit) Regulations 2006.

27. Regulation 7(5) says:

“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”.

28. Regulation 30(2) provides,

“... 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,
...
- (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;

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

29. Regulation 32(2) says

“the police 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 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, ...shall be final.”

30. Regulation 33 says,

“Refusal to be medically examined

“If a question is referred to a medical authority...and the person concerned wilfully or negligently fails to submit himself to such medical examination or to attend such interviews as the medical authority may consider necessary in order to enable him to make his decision, then—

- (a) if the question arises otherwise than on an appeal to a board of medical referees, the police authority may make their determination on such evidence and medical advice as they in their discretion think necessary;
- (b) if the question arises on an appeal to a board of medical referees, the appeal shall be deemed to be withdrawn.”

31. Regulation 37(1) says:

“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.”

Relevant Scheme Documents

32. Home Office Circular 46/2004 is guidance issued by the Home Office. Annex C of the circular addresses matters concerning the review of police injury pensions.
33. In January 2012 the circular was deemed to be unlawful in part by His Honour Judge Behrens. A further judicial review hearing, before Mr Justice Supperstone at Leeds High Court in February 2012 held that part of Home Office circular 46/2004, concerning "Review of Injury Pensions once Officers reach 65", and paragraph 20 of section 5 of the Home Office 'Guidance on Medical Appeals under the Police Pensions Regulations 1987 and the Police (Injury Benefit) Regulations 2006' are inconsistent with the Police (Injury Benefits) Regulations 2006 and therefore unlawful.
34. Home Office Guidance For Forces On Reviews Of Injury Awards. The introduction to Annex C states:
- “This Guidance is being issued to help ensure a fairer, more cohesive approach to the payment of injury benefits to ill-health retired officers who have reached the compulsory retirement age with their Force. A recent survey found that practice in this area was diverse. Some forces automatically reduced degree of disablement benefits to the lowest banding when this age had been reached - others continued to pay benefits at the same rate until the death of the Officer concerned. It is clear that a more standardised approach is needed to safeguard the rights of the Officer and ensure fair treatment across Forces.”
35. The guidance went on to advise that once a former officer receiving an injury pension reaches what would have been his compulsory retirement age under the Police Pensions Regulations the force should consider a review of the award, since it was no longer appropriate to use the former officer’s police pay scale as the basis for his or her pre-injury earning capacity - in the absence of a cogent reason for a higher or lower outside earnings level, it was suggested that the new basis for the person’s earning capacity should be the National Average Earnings

(NAE) at the time of the review. The loss of earning capacity for the purpose of establishing the degree of disablement should therefore be assessed by reference to the % proportion the person's actual earning capacity bore to NAE.

36. The guidance went on to say that once a former officer receiving an injury pension reached 65 they will have reached their State Pension Age irrespective of whether they are male or female. The force then had discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest band of degree of disablement. At such a point the former officer would normally no longer be expected to be earning a salary in the employment market. A review at age 65 would normally be the last unless there were exceptional circumstances which required a further review.”

Summary of Mr Hughes' position

37. WYPA provided him with erroneous information that his injury benefit award would be payable for life and not subject to a review when he became 65. As a result, he was denied the opportunity to put in place alternative pension provision.
38. Had he been made aware from the outset of the possibility that his injury benefit award would be subject to review and may be withheld at some point in the future he would have transferred his Scheme pension to the private sector.
39. The review of his injury benefit award by WYPA was undertaken because of the imminence of his 65th birthday.
40. An interval of 20 years for WYPA to undertake a review of his injury benefit award was unacceptable.
41. WYPA have not issued guidelines on the timescale for reviewing injury benefit awards.
42. Throughout the review of his case WYPA provided him with misleading information regarding the review process, i.e. how and when it would be conducted. He was initially informed that the review would take the form of a face to face meeting where both sides would have the opportunity to present their case. However, the review was conducted without his knowledge or input despite assurances given to the contrary.

43. WYPA informed him in their letter of 20 September 2012 that his failure to release his medical records was the reason why his injury benefit award would not be reinstated. He was subsequently informed by WYPA on 20 June 2013 of an entirely different decision that PMAB had ruled that there had been a “material” not substantial change in his qualifying injury that altered his earnings capacity.
44. WYPA told him that the PMAB’s decision was final. This meant that he had no other avenue of appeal left open to him.
45. WYPA acknowledge that the review of his injury benefit award commenced in accordance with the advice contained in (HOC) 26/2004 and not Regulation 37. This assertion is supported by the fact that the proposed reduction to his injury benefit award was scheduled to put into effect when he attained the age of 65. This was unlawful and does not comply with the Regulations in that the age of the recipient of an award was not a factor to be considered.
46. WYPA’s assertion that they abandoned use of (HMO) 46/2004 at some unspecified date was questionable. If they had indeed abandoned the use of (HMO) 46/2004, why in their opening written submission to the PMBA did they say that the members should take into account the advice contained in (HMO) 46/2004 when arriving at their decision?
47. WYPA failed to make him aware in writing and in a timely fashion that they abandoned use of (HMO) 46/2004. This resulted in the main thrust of his appeal submitted to the PMAB being undertaken on the basis that the reduction of his award was based on the discredited HMO circular and was therefore unlawful.
48. He was not given the opportunity to cross examine the representatives of WYPA at the appeals board hearing.
49. He was not informed by WYPA about the decision of the PMAB that there had been a substantial change in his qualifying injury. He also questions the right of the PMAB to make such a decision.
50. He made repeated written and verbal requests to WYPA that they comply with the Regulations and subject him to a medical examination to determine if there had been a material change in his qualifying condition. He says that his requests were ignored.

51. He is astonished by the Deputy Ombudsman's preliminary decision to uphold the decision of the PMAB that at age 65 his earnings capacity has improved. Despite the fact that he had suffered and received treatment following heart problems, had been diagnosed as having prostate cancer also the injury that resulted in his retirement has further degenerated and now adversely impacts and restricts both his social and domestic life.

Summary of WYPA's position

52. At the time of his retirement Mr Hughes signed to confirm that he was claiming the correct amount of injury benefit award in accordance with the Regulations. He therefore had a duty to himself to ensure that he fully understood what he was claiming and the provisions as laid out in the Regulations. At the time Mr Hughes retired relevant information would have been available from WYPA's pensions department.
53. WYPA do not provide advice to officers on financial matters. They cannot accept any liability in relation to decisions made on whether or not to make additional pension provision.
54. WYPA originally intended for the review to commence in accordance with Regulation 37 and the guidance contained in Home Office Circular (HOC) 46/2004. However, as Mr Hughes had not responded to any of the notifications from WYPA they instigated and applied Regulation 33 rather than continue with a review in accordance with the normal process.
55. Had Mr Hughes responded to WYPA's initial letters of 7 April 2008, 26 May 2009 and 13 July 2009 regarding the review of his injury benefit award, he would have had sufficient opportunity to submit all the information required for the assessment process. However, once the certificate was signed by the Doctor, this became a legal document, in accordance with the Regulations, that could not be reversed and was final subject to Regulation 31 or 32.
56. The Regulations do not specify what is meant by the term suitable intervals in connection with the timing of reviews. It was WYPA's own decision as to what constitutes a reasonable time period.
57. Injury benefit award cases up for review were selected at random based upon availability of resources to undertake the review.

58. Mr Hughes had several opportunities to submit full evidence to enable his case to be properly reviewed. He was also given sufficient notice, explanation and opportunity to forward detailed submission to the PMAB.

Conclusions

59. My role in connection with this case is to establish if the process followed by WYPA in reviewing Mr Hughes' injury benefit award was correct and whether the decision reached by them was made properly. It is not to decide the level of injury benefit award that was appropriate to Mr Hughes' circumstances.
60. The review of injury benefits under Regulation 37 has been 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 properly be conducted.
61. In *R (on the application of Pollard) v The Police Medical Appeal Board and West Yorkshire Police Authority* [2009] EWHC 403, Silber J found that Regulation 37 does not enable the police authority to reach a different conclusion on the issues specified in Regulation 30(2)(a), (b) or (c). That is, a review may not consider whether the person concerned is disabled, whether the disablement is likely to be permanent, or whether the disablement is the result of an injury received in the execution of duty. This approach was approved in both the *Turner* and subsequent *Laws* cases. The only question for WYPA, the SMP and then the PMAB was whether the degree of Mr Hughes' disablement had substantially altered since the previous review.
62. In both the *Turner* and *Laws* cases, it was accepted that the degree of a pensioner's disablement could alter by virtue of his earning capacity improving either by some improvement in his condition or because a job had become available which the pensioner would be able to undertake.
63. So the SMP and the PMAB were required to address the following questions:
- had there been a substantial change in Mr Hughes' disabling condition since the last review; and
 - were there now jobs available to him which he could undertake, but which had not previously been available?

64. Mr Hughes' medical history was considered and the type of employment open to him was properly discussed; therefore the right questions were considered and WYPA's decision was not perverse. I am also satisfied that they had properly considered whether there was a change in his condition as the PMAB report of 8 August 2011 considers this point.
65. Mr Hughes says that he asked WYPA to subject him to a medical examination to determine if he had a material change to his qualifying medical condition. I note that Mr Hughes was seen by Dr Nightingale and that the PMAB took account of this before reaching their final decision. So I do not think that Mr Hughes has suffered any injustice in this regard.
66. Mr Hughes was told by WYPA on 20 June 2012 that the decision made by the PMAB was of a material change to his earning capacity. In the PMAB's report of 8 August 2011 they considered that there was a significant reduction in his degree of disablement. I take the view that the terms used by the PMAB to describe the change in Mr Hughes' circumstance were in line with the conditions of the Regulations.
67. Regulation 32 (2) provides for any earlier decision to be referred to the PMAB for a final decision. I note that WYPA wrote to Mr Hughes on 20 April 2011 about the referral and that Mr Hughes had subsequently complied with the referral process.
68. It follows there is evidence that both the WYPA and the PMAB considered whether there had been a substantial change in Mr Hughes' earning capacity and a shift in position rather than re-reviewing the original 1989 decision. I am also satisfied therefore that adequate processes were followed and the decisions reached by WYPA and PMAB subsequently cannot be considered perverse.
69. WYPA had written to Mr Hughes on 27 April 2009 indicating that the review of his injury benefit award would take into account HOC 46/2004. However, Mr Hughes was made aware by WYPA on 20 April 2011, prior to the appeal hearing of the PMAB that following subsequent court cases that they had changed the process of reviewing injury benefit awards for those over age 65 which were now carried out in accordance with the Regulations. Therefore at the time of his appeal to PMAB Mr Hughes had received clear information about the date of the appeal and had reasonable opportunity to submit his written evidence based on

WYPA's revised approach to reviewing injury benefit awards. In addition, Mr Hughes' case was further reviewed by the WYPA after the PMAB decision which took into account his comments about the about HOC 46/2004.

70. Although WYPA had initially informed Mr Hughes that his injury benefit award was being reduced in accordance with the Regulations because of his failure to provide full medical details, at the time of his appeal to the PMAB they had obtained from Mr Hughes further medical and employment details and were able to determine that there had been a material change to his earning capacity. This would account for the differing explanations given by WYPA for not upholding his claim.
71. I do not see that Mr Hughes can successfully challenge WYPA's decision to carry out a review. Regulation 37(1) imposes a duty on the WYPA to review the degree of disablement at such intervals as may be suitable. Further, Mr Hughes should have been aware that Regulation 37(1) allows WYPA to review his injury benefit award. This is because he signed the Injury Pension form on 15 May 1989 confirming that he understood that was claiming the award in accordance with the Regulations.
72. However, whilst WYPA were entitled to review Mr Hughes' injury award, they do not appear to have a consistent policy on when reviews are carried out or how or when they notify individuals that their benefits may be reviewed. The fact that the review came after an interval of almost 20 years during which there had been no mention of a review will have caused Mr Hughes considerable distress. Whilst Mr Hughes ought to have known at the outset that his injury benefit award was subject to review, he was unaware when that might happen or that, at age 65, his degree of disablement could be reassessed as a band 1 injury. The failure to give Mr Hughes any information over a 20 year period or alert him to what might happen at age 65 was maladministration by WYPA. This should be recognised and appropriately compensated. I have made directions for the payment of a modest sum in recompense.
73. However, although Mr Hughes' review was not carried out until almost 20 years after his injury benefit award was first granted, the delay was to his advantage. His injury pension was not reduced until after the final review.

74. Although I consider the decisions referred to above were made correctly, there is one further point. In 2012 Mr Hughes again requested a review. He says he was informed by WYPA that the decision taken by the PMAB was final and therefore he had no further opportunity to appeal their decision.
75. WYPA's response of 20 June 2013 was that the decision of the PMAB was final and they had to abide by it, so they could not reinstate his pension. It is correct that the decision was final, and WYPA could not of its own account decide to reinstate his award. However, regulation 32(2) allows the police authority and the claimant, by agreement, to refer for reconsideration any final decision of a medical authority that has given a decision. 'Medical authority' includes a PMAB. So WYPA could have agreed with Mr Hughes to refer the matter back to the PMAB to reconsider its decision and, if necessary, issue a fresh report.
76. As this was a matter for agreement between the parties, there was no obligation on WYPA to agree to a referral. In the *Haworth* case, the court confirmed that the general principles apply as to how an authority should exercise this discretion. So WYPA had to consider his request and exercise discretion correctly; in other words, apply the law correctly (in this case, regulation 32(2)); ask itself the right questions; and take account of all relevant information. The first point is to apply the law correctly. But WYPA seems to have ignored regulation 32(2) and only considered the fact that the PMAB's decision was 'final'. They did not give any consideration at all to whether they should agree to refer the decision for reconsideration, since they felt they could not do this.
77. Of course, there was no obligation for WYPA to agree the request. But they were obliged to consider it properly and failed to do this. So they should now deal with Mr Hughes' request for a reconsideration properly, applying the usual principles as to how an authority should exercise discretion and, if they refuse his request, give valid reasons for doing so.

Directions

78. I direct that within 28 days of this determination WYPA shall
- consider his request for a review of the PMAB's decision, applying the law correctly and taking account of all relevant information;

- pay Mr Hughes £150 for the distress and inconvenience caused to him by their maladministration as identified above.

Jane Irvine
Deputy Pensions Ombudsman

5 August 2014