PO-28866

Ombudsman's Determination

Applicant:	Mr S
Scheme:	Police Injury Benefit Scheme (Scotland)
Respondent:	Scottish Police Authority (**SPA**)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by the Scottish Police Authority.

Complaint summary

2. Mr S has complained that SPA has declined his request for a review of his injury on duty (**IOD**) award under Regulation 32(2) and (3). Mr S has asked that SPA reconsider the reduction of his IOD award from 2005 to 2016.

Background information, including submissions from the parties

Background

3. The relevant regulations are The Police (Injury Benefit) (Scotland) Regulations 2007 (SSI2007/68) (as amended) (the **2007 Regulations**). Mr S' initial IOD award and the review undertaken in 2005 were subject to The Police Pensions Regulations 1987 (SI1987/257) (as amended) (the **1987 Regulations**). The 1987 Regulations have since been amended and the regulations relating to IOD awards revoked. The 2007 Regulations provide that they shall have effect as if anything done, or treated as done, under or for the purposes of the 1987 Regulations had been done under or for the purposes of the corresponding provision in the 2007 Regulations. Extracts from the relevant regulations are provided in Appendix 1.

4. Mr S retired on the grounds of ill health in December 2002. He was awarded an IOD benefit in 2003. The degree to which his earning capacity had been affected was assessed as being between 51% and 75% ("major disablement" according to a table in Schedule B, 1987 Regulations). The Selected Medical Practitioner (**SMP**) provided a certificate to this effect and stated that Mr S was suffering from a "severe mental health condition". In subsequent correspondence with SPA, the SMP referred to

reports from a consultant psychiatrist, Dr Griffin, a counselling psychologist, Mr Dickinson, and Mr S' GP. The SMP said he was of the opinion that Mr S was suffering from "a severe post traumatic stress disorder along with a significant depressive illness".

5. Mr S' IOD award was reviewed in 2004/05. The Force Medical Adviser (**FMA**), Dr Warnock, sought a report from a Consultant Forensic Psychiatrist, Dr Wood. Dr Warnock said:

> "In my opinion [Mr S] is not currently fit to undertake the duties of an operational police officer. As requested, I have written a referral to Dr Peter Wood and I have obtained [Mr S'] consent to furnishing Dr Wood with a copy of his Occupational Health medical file."

6. In a memorandum to SPA, Dr Warnock said Mr S had been referred to Dr Wood "to assist in coming to a conclusion regarding the appropriateness or otherwise of a personal injury award" and to make a recommendation on this.

7. Dr Wood provided a report in February 2005. A summary of this and other medical evidence relating to Mr S' case is provided in Appendix 2.

8. Dr Warnock wrote to SPA, on 28 February 2005:

> "Dr Wood concludes that [Mr S] is suffering from a major depressive disorder, the origins of which are, at least to a degree, connected with his duties as a police officer. It is significant that he does not believe [Mr S] to be suffering from post-traumatic stress disorder.
>
> In regard to the question of injury award, Dr Wood is very specific, and says that the degree of disability is now "minor" and significantly less than the 50%-75% disability calculated three years ago. He estimates the current level to be between 15%-25%, falling to 5%-10% within the next twelve months."

9. Dr Warnock recommended accepting Dr Wood's report. In subsequent correspondence, SPA provided Dr Warnock with earnings information; specifically, the salary for an area commander (£53,931 to £59,500) and an HR post (£46,148 to £51,344). SPA said Mr S would have been earning £61,800 in 2005. SPA said, if the percentage reduction proposed was implemented, Mr S' annual IOD award would change from £18,207 to £2,045. It anticipated such a considerable reduction being challenged. In response, Dr Warnock said the hypothetical reduction in earnings for Mr S was approximately 15%, placing him in the lowest banding for an IOD award. He said he could see no reason to question Dr Wood's reasoning and recommended an adjustment to Mr S' IOD award.

10. In September 2005, SPA sent Mr S a copy of his personnel file in response to a request for information from him. In its covering letter, SPA asked Mr S to confirm whether he wished to appeal the decision to reduce his IOD award. It acknowledged that Mr S had previously stated that he wished to appeal but required further

information. SPA asked Mr S to confirm his appeal within 14 days of receiving its letter.

11. In 2010, Mr S requested a review of his IOD award. The SMP, Dr Scott, recommended that his award should remain at its current level with a review in three years' time. SPA forwarded a copy of Dr Scott's report to Mr S. It noted Dr Scott's recommendation and said Mr S had a right of appeal.

12. In 2015, Mr S requested a review of his IOD award. His case was considered by Dr Watt, who issued a report, in March 2016, estimating Mr S' loss of earning capacity at between 51% and 75%. Dr Watt said Mr S was permanently disabled in respect of "Depression and Post Traumatic Stress Disorder ICD 10: F43.1, F32.2".

13. Mr S wrote to SPA on 29 May 2017. He said Dr Watt's report set out the position which should have applied from the outset and, if he had been correctly assessed previously, there would have been no requirement for him to appeal. Mr S asked SPA to consider financial compensation in recognition of the loss of income he had suffered. He also asked that SPA remove the requirement for his IOD award to be reviewed in the future.

14. SPA responded on 18 July 2017. It said:-

- It was speculation to suggest that the assessment of Mr S' degree of disablement would have been the same in 2013, if it had been reviewed at that time.

- Mr S' degree of disablement had been assessed in 2004 and 2010. If he had been dissatisfied with the decisions, he could have appealed. It appreciated that Mr S may not have felt able to engage with the appeal process at the time, but the fact remained that he had the right to appeal and did not exercise this.

- Mr S had referred to impropriety on the part of personnel at Central Scotland Police. Reassessment of an individual's degree of disablement was undertaken by a doctor and was an independent and impartial process.

- It did not accept that the lack of a review in 2013 amounted to maladministration on its part. Regulation 37(1) provided that the police authority "shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered". The use of the word "shall" meant that SPA was obliged to carry out reassessments, but the phrase "at such intervals as may be suitable" gave it a degree of flexibility as to when a reassessment took place.

- If Mr S had been anxious to have his degree of disablement reassessed in 2013, it had been open to him to contact SPA at that time and request a reassessment.

- A recommendation to refrain from instructing reassessments pending a review of the regulations had been issued by the Scottish Public Pensions Agency and was extant in 2013.

- Under Regulation 37(1), it was obliged to carry out regular reassessments of Mr S' degree of disablement. However, in the circumstances, it considered a period of five years would be appropriate in Mr S' case; that is, not until March 2021.

15. Following further correspondence, SPA issued a response on 3 September 2018. Its decision is summarised as follows:-

    - Compensation should not be paid because there were no grounds to justify it.

    - Mr S' request for compensation was based on the fact that the first two reviews by SMPs determined a lower scale of disablement than the most recent review. However, the SMPs were the experts in the matter. If Mr S had been dissatisfied with the earlier decisions, he should have exercised his right of appeal at the time. The fact that he now had a different level of award did not mean that it could be applied retrospectively or that the 2004 (sic) and 2010 reviews were wrong.

    - Regulation 37(1), the 2007 Regulations obliged SPA to carry out regular reassessments of the degree of disablement of former police officers in receipt of IOD awards.

    - Following Mr S' historical engagement with SPA's solicitor, in a letter dated 18 July 2017, it proposed that his next review would be five years from that date; that is, March 2021 (sic).

    - It could not instruct that reviews not take place because this would put SPA in breach of the 2007 Regulations.

16. Mr S applied to The Pensions Ombudsman (**TPO**) in January 2019. TPO asked Mr S if he had raised his complaint via the Scheme's internal dispute resolution procedure (**IDRP**) and, if not, to do so in the first instance. TPO explained that this step was required before Mr S' complaint could be accepted for investigation.

17. On 29 January 2019, Mr S's solicitor submitted a request for Mr S' case to be reconsidered under Regulation 32(3) to SPA. It appears that SPA did not receive this request[1]. Mr S' solicitor subsequently followed up the Regulation 32(3) request and submitted a complaint of maladministration to SPA.

18. On 15 May 2019, SPA wrote to Mr S' solicitor. It said:-

    - Mr S' degree of disablement had been assessed on four separate occasions; 2003, 2005, 2010 and 2016.

    - The decision to reduce Mr S' degree of disablement in 2005 had been made by Dr Warnock, rather than Dr Wood. SPA referred to a memorandum, dated 25 April 2005, in which Dr Warnock had referred to 'recommendations' from Dr Wood.

[1] Mr S' solicitor has submitted a proof of delivery receipt from the Royal Mail indicating an item was delivered at 7:58 a.m. on 31 January 2019.

- It was commonplace for an SMP to commission reports from experts. In 2003, the SMP had said that Mr S was suffering from a severe mental health condition. Therefore, it was entirely reasonable for Dr Warnock to commission a report from a consultant forensic psychiatrist.

- Given that Dr Warnock's assessment had been made 14 years ago and Dr Scott's assessment over eight years ago, it could see no merit in instructing an SMP now to ascertain Mr S' degree of disablement in 2005 and 2010. Making such retrospective assessments would be extremely difficult; if not impossible.

- In *Boskovic*[2], the Court had found that delay can be a legitimate reason for refusing to agree to a referral under Regulation 32(3).

- It could see no basis for the assertion that the 2005 and 2010 reviews were wrong or legally untenable. Mr S obviously disagreed with the decisions by Dr Warnock and Dr Scott, but there was no evidence that the decisions were fundamentally flawed.

- It was not prepared to agree to refer Mr S' case for review under Regulation 32(3).

19. On 16 May 2019, SPA wrote to Mr S' solicitor stating that there was no IDRP for IOD awards. It said eligibility for an IOD award did not depend upon membership of the Police Pension Scheme and such awards were, effectively, compensation for work-related injuries; not an occupational pension.

20. In subsequent correspondence, SPA maintained its position with regard to IDRP and the nature of the Scheme. With regard to its decision to refuse Mr S' Regulation 32(3) request, SPA expressed the view that, given the substantial elapse of time, it would not now be possible for there to be a fair reconsideration of Mr S' degree of disablement in 2005 and/or 2010.

Mr S' position

21. Mr S' solicitor has made extensive submissions on his behalf. These have been considered, but it would not be practical or helpful to reproduce them in full here. What follows is, of necessity, a summary of the main points:-

- At the time of his retirement, Mr S was suffering from severe depression, anxiety and post-traumatic stress disorder (**PTSD**). These conditions resulted directly from his experiences surrounding the Dunblane incident, the way in which he was subsequently mistreated and the mismanagement of his retirement.

- The 2005 reduction of Mr S' IOD award and the 2010 confirmation of this are legally untenable.

[2] *Boskovic v Chief Constable of Staffordshire Police* [2018] EWHC 14 (Admin)

- Mr S was not well enough, at the time, to appeal the 2005 reduction or the 2010 confirmation of this.

- Mr S was not provided with a copy of Dr Warnock's report until 2015.

- A further review following the reduction of Mr S' IOD award was not instigated by SPA until requested by Mr S.

- No further review was instigated by SPA following the 2010 review until Mr S requested one in 2015.

- Regulations K2 and 37(1) place a statutory duty on a police authority to consider whether the degree of a person's disablement has altered. If the authority finds that the degree of disablement has altered substantially, it shall revise the IOD award accordingly.

- No meanings are ascribed to the words and expressions contained in Regulation 37(1). As a result, the "literal rule" must be applied to their meaning. "Consider" means to reflect upon or contemplate. "Find" means to become aware of. "Reassessment of injury pension" should be considered in the context of words used elsewhere in the Regulations; such as "determine" and "decision". Regulations K2 and 37(1) require the pensions authority to reflect on and become aware of any alterations to the degree of a pensioner's disablement. The authority is required to revise the injury pension if it becomes aware of a substantial alteration in the person's degree of disablement.

- Substantial alteration is an alteration or change likely to result in a change of banding. Such a finding was missing in the 2005 review.

- The reassessment of an IOD award is a two-stage process. Stage 1 is a matter for consideration and finding for the police authority. Stage 2 is a matter for decision and finality of decision by the medical authority. Once the police authority has found substantial alteration, the process requires it to refer the statutory medical question to the medical authority for decision.

- A Regulation H1 decision on permanent disability is binding for the purposes of the 2007 Regulations[3]. The Courts have found that, by requiring the SMP to provide a report, their answers to the questions posed in Regulation 30(2)(a) and (b) are indivisible from their reasons for those answers.

- Home Office (**HO**) guidance to Police Medical Appeal Boards (**PMAB**) states:

[3] *R (on the application of Evans) v Cheshire Constabulary and PMAB* [2018] EWHC 952 Admin (QB) (paragraphs 35, 38 and 39); *R (on the application of South Wales Police Authority v The Medical Referee (Dr David Anton) and Phillip Crocker* [2003] EWHC 3115 (Admin); *Metropolitan Police Authority v Laws and another* [2010] EWCA Civ 1099 (paragraph 28); *Fisher v Chief Constable Northumbria Police and PMAB* [2017] EWHC 455 (Admin).

> "In order to assess the degree of disablement the SMP will need to consider by reference to the person's background, skills and qualifications what kind of employment he or she could undertake, allowing for the particular effects of the qualifying injury … it is not necessary for the person to have found work for an assessment to be made of degree of earning capacity. Nor do earnings in a current [job] necessarily accurately reflect potential earnings, if the present job is not commensurate with the person's experience, skills and educational qualifications. In all cases the Police Authority will ensure that the SMP is provided with information about current outside earnings and the relevant job descriptions so that the person's earnings capacity can be established in the light of the SMP's assessment of the person's capabilities after the injury … the fact that a person is living in a place of high unemployment or abroad should not affect the issue of earning capacity as a result of disablement. The likely attitude of employers or of the labour market towards those suffering the physical or mental disability in question is also irrelevant to the question of earning capacity."

- The guidance is non-statutory, but the Courts[4] have found that public authorities have a duty to consider such guidance.

- A report dated 9 November 2004 confirmed that Dr Warnock had undertaken a review in accordance with Regulation K2 of the 1987 Regulations and found that Mr S' permanent disability had not ceased.

- It is axiomatic, given Dr Warnock's finding that Mr S was currently not fit to undertake the duties of an operational police officer, that there had been no substantial alteration in his degree of disablement.

- Dr Wood could only be instructed to conduct an assessment in accordance with Regulation K2. Dr Warnock had said, in a letter dated 20 December 2004, "… the reason for the former officer being referred to Dr Peter Wood is to assist in coming to a conclusion regarding the appropriateness or otherwise of a personal injury award …" This was not permitted under Regulation K2[5]. The permanently disabling conditions determined by Dr Hamilton were final and binding on all doctors carrying out subsequent reviews of Mr S' IOD award.

- Dr Wood revisited causation, which he was not entitled to do under Regulation K2. He revisited the qualifying injuries which he was not permitted to do.

- On 4 April 2005, Dr Warnock provided a report to the Deputy Chief Constable (see Appendix 2). The approach Dr Warnock suggested in his report is not compatible with HO and Police Negotiating Board (**PNB**) guidance. For example,

[4] *R v North Derbyshire Health Authority, ex parte Fisher* [1997] 38 BMLR 76
[5] *R (on the application of Evans) v Chief Constable of Cheshire Constabulary and PMAB* [2018] EWHC 952 (Admin); *R (on the application of Turner) v Police Medical Appeal Board* [2009] EWHC Admin 1867; *Metropolitan Police Authority v Laws & Anor* [2010] EWCA Civ 1099

both HO guidance and PNB circulars are clear that doctors should refer to either ICD[6] 10 or DSM[7] IV.

- In 2010, Mr S was told by Dr Scott that he could not agree with Dr Wood's assessment. However, Dr Scott's report subsequently recommended the reduced award be maintained. No justification for this was offered and no cognisance was taken of Mr S' GP's report.

- Dr Scott had recommended a review in three years. This did not happen and there was no review until Mr S requested one in 2015.

- Dr Watt found no substantial alteration from the original award.

- Dr Morris' report, dated 10 May 2017, provides further evidence of there being no substantial alteration in Mr S' degree of disablement.

- Drs Warnock, Wood and Scott are all retired. Therefore, Mr S is seeking a review under Regulation 32(3).

- Regulation 32(2) and (3) provide authority for the police authority and the former officer to "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".

- HO guidance, which applies to Scotland as well as England and Wales, makes reference to agreed reconsiderations.

- SPA can agree to a reconsideration under Regulation 32(3), but has chosen not to do so. Mr S is seeking a Determination from the Pensions Ombudsman requiring SPA to refer his case for reconsideration under Regulation 32(3) within a timeframe which the Pensions Ombudsman deems reasonable. Any such Determination should provide that the SMP to whom the case is referred should be agreed in advance and, if possible, an agreed bundle of documents should be sent to the SMP and copied to the parties.

- In *Michaelides*[8], the judge said:

  "… the purpose of regulation 32(2) is to allow the claimant and police pension authority, by agreement, to avoid an unfair outcome which the finality of decisions might otherwise create."

- In *McLoughlin*[9], the judge said:

  "… any fresh report made under Regulation 32(2) which changes the degree of disablement of the former officer, takes effect in substitution for the report which it replaces."

[6] International Classification of Diseases
[7] Diagnostic and Statistical Manual
[8] *R (ota Michaelides) v Chief Constable Merseyside Police and PMAB* [2019] EWHC 1434 (Admin)
[9] *Mcloughlin v Chief Constable of West Yorkshire* [2019] 045 PBLR (017)

- On a reconsideration of a decision in public law, the body undertaking the reconsideration must address the same issue as the body which made the original decision and is bound by the same restrictions as the original decision-maker[10].

- In *Haworth*[11], Mr Justice King said:

  "… regulation 32(2) should be construed as a free standing mechanism as part of the system of checks and balances in the regulations to ensure that the pension award, either by way of an initial award or on review …, has been determined in accordance with the regulations and that the retired officer is being paid the sum to which he is entitled under the regulations. It must be the overall policy of the scheme that the award of pension reflects such entitlement and I see no reason why regulation 32(2) should be construed simply as a mechanism to correct mistakes which might nonetheless be able to be corrected by some other means." (paragraph 96)

- It is acknowledged that, in *Boskovic*[12], the Court found that delay can be a viable consideration in refusing a Regulation 32 request. That case is being appealed[13]. In any event, delay is not an issue in Mr S' case because the actions of Drs Warnock, Wood and Scott are legally untenable.

- In *Michaelides*, the judge also said:

  "… the starting point is that where there has been an unlawful decision it should be quashed unless there is some compelling reason not to do so. The extension of time for bringing the challenge has been dealt with … It is only if I was satisfied that it would be unjust to the defendant due to its difficulties in investigation that I should decline relief …"

- Mr S received a backdated Band 3 award, in 2016, but has not been provided with detailed calculations of his award.

- With regard to jurisdiction, in a recent Employment Tribunal case[14], the employment judge concluded that the injury benefit scheme for police officers in England and Wales fell within the definition of an occupational pension scheme in Section 212, the Equality Act 2010.

- The Pensions Ombudsman's jurisdiction was not questioned in *McLoughlin*.

- The Pensions Ombudsman has issued a number of Determinations relating to police injury benefit cases in Scotland, Northern Ireland and England.

[10] *R v Ipswich Justices ex parte Robson* [1971] 2 QB 340
[11] *R (on the application of Haworth) v Northumbria Police Authority* [2012] EWHC 1225 (Admin)
[12] *Boskovic v Chief Constable of Staffordshire Police* [2018] EWHC 14 (Admin)
[13] *Boskovic v Staffordshire Police* [2019] EWCA Civ 676
[14] *Curry v Northumbria Police* (2500281/2017) (paragraph 41)

The SPA's position

22. The SPA submits:-

- It wishes to challenge the *locus* of the Pensions Ombudsman in relation to Mr S' complaint. The complaint does not relate to an occupational pension scheme as defined in Section 1, the Pension Schemes Act 1993. The regime of awards available to former police officers in terms of the 2007 Regulations is more akin to a workplace compensation scheme. There is a contributory occupational pension scheme available to police officers and it refers to the Police Pensions Regulations 1987 (SI1987/257).

- With regard to the Employment Tribunal judgment in *Curry*, it does not consider the view of a single Employment Judge on the question of whether the Police Injury Benefit Scheme is an occupational pension scheme to be particularly authoritative or persuasive. It has no knowledge of previous Pensions Ombudsman Determinations, so it cannot comment on these.

- On the merits of Mr S' complaint, its position is unequivocal. Mr S asserts that it has decided that it will not reconsider his degree of disablement in relation to his IOD award. However, it has no power to reconsider Mr S' degree of disablement. Under Regulation 30, an individual's degree of disablement falls to be determined by the SMP.

- Mr S is clearly dissatisfied with the determinations made by the SMPs in 2005 and 2010. However, he failed to exercise his right of appeal at the time.

- Mr S is, in effect, contending that the 2016 SMP's decision shows that the previous SMPs' decisions in 2005 and 2010 were incorrect. However, due to the number of years which had elapsed since the 2005 and 2010 decisions, the SPA was not prepared to agree that they be referred back to the SMPs for reconsideration. This was entirely reasonable in the circumstances.

- Any instruction by the Pensions Ombudsman for SPA to refer the 2005 and 2010 decisions for reconsideration under Regulation 32(2) would be *ultra vires*.

- If Mr S' solicitors believe that the decision by SPA to decline Mr S' request that the 2005 and 2010 be referred for reconsideration under Regulation 32(2) is unreasonable, irrational, perverse or flawed, the appropriate remedy would be for Mr S to seek a judicial review of the decision.

- It is not in a position to comment on allegations of impropriety by senior personnel at Central Scotland Police. However, reassessment of an individual's degree of disablement is undertaken by an independent SMP. Therefore, any alleged acts of impropriety by senior personnel at Central Scotland Police would not have affected the SMPs' determinations of Mr S' degree of disablement.

Adjudicator's Opinion

23. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by SPA. The Adjudicator's findings are summarised below:-

Jurisdiction

- SPA had asserted that the Scheme was not an occupational pension scheme and, therefore, did not fall within the jurisdiction of the Pensions Ombudsman.
- Section 146, the Pension Schemes Act 1993 (**PSA93**) provides:

"(1) The Pensions Ombudsman may investigate and determine the following matters -

(a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme, …"

- The definition of "occupational pension scheme" is found in Section 1, Part 1, PSA93 as follows:

"(1) In this Act, unless the context otherwise requires -

"occupational pension scheme" means a pension scheme -

(a) that -

(i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or

(ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force,

or a pension scheme that is prescribed or is of a prescribed description; …

(5) In subsection (1) "pension scheme" (except in the phrases "occupational pension scheme", "personal pension scheme" and "public service pension scheme") means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people -

(a) on retirement,

(b) on having reached a particular age, or

(c) on termination of service in an employment."

- Regulation 11, the 2007 Regulations, provided for the payment of a gratuity and an injury pension to a person to whom the regulation applied. Section 1(a)(i), PSA93, stated that an occupational pension scheme was a pension scheme for the purpose of providing benefits to people with service in employments of a description. The wording in Section 1(1)(a)(i) and 1(5) would appear to be sufficiently broad to cover an IOD award under the 2007 Regulations or their predecessors. In coming to this view, the Adjudicator said she was guided not only by the *Curry* judgment but also *City and County of Swansea v Johnson* [1999] 1 All ER 863. She acknowledged that both *Curry* and *City and County of Swansea* related to injury benefit schemes covering England and Wales. However, the definition of an occupational pension scheme upon which the judgments were based was found in primary legislation which also applied in Scotland.

- The Adjudicator said she was of the view that the Scheme was an occupational pension scheme for the purposes of the Pensions Ombudsman's jurisdiction.

Review of Mr S' IOD award

- The essential elements of Mr S' complaint were:-

  - The 2005 and 2010 reviews of his IOD award were not undertaken in accordance with the relevant regulations; and

  - SPA has declined to refer his case for reconsideration, under Regulation 32(2) and (3), in order that the flaws in the 2005 and 2010 reviews can be addressed.

- The Adjudicator said she was conscious that an application to the Pensions Ombudsman should be made within three years of the act or omission which is the subject of the complaint or dispute, as the case may be, or within three years of the applicant becoming aware of the act or omission[15]. There was some discretion for an application to be accepted outside of this timeframe where, in the opinion of the Pensions Ombudsman, it was reasonable for it not to have been made any earlier. On the face of it, the conduct of the 2005 and 2010 reviews would fall outside the three year timeframe. The Adjudicator acknowledged that Mr S had explained that he had not been well enough to pursue an appeal at the relevant times. However, the Adjudicator noted that Mr S' health had not improved since 2005 or 2010 and he had, with assistance, been able to pursue his case as far as the Pensions Ombudsman on this occasion. She said that she did not see

[15] Regulation 5, The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (1996/2475) (as amended)

that there would be grounds for extending the timeframe for making an application to the Pensions Ombudsman in respect of the 2005 and 2010 reviews per se.

- However, Mr S' request for a review under Regulation 32(2) was within the timeframe for an application to the Pensions Ombudsman. In the Adjudicator's view, it would not be possible to consider Mr S' complaint about SPA's decision to decline his request without looking at the 2005 and 2010 reviews; at least to some extent. If, as was argued on Mr S' behalf, those reviews were flawed, this would be a factor which SPA could be expected to take into account in deciding whether to accede to his request. The parties held very different views on this.

- SPA had declined Mr S' request that his case be referred to an SMP under Regulation 32. The request had been made by reference to Regulation 32(3) because Dr Warnock and Dr Scott had retired since their reports of 2005 and 2010 respectively. However, the provision for there to be agreement to a referral for reconsideration was found in Regulation 32(2) in the first instance.

- SPA's role when it received a request to refer a case for reconsideration under Regulation 32 had been clarified by the Courts[16]. SPA was not obliged to accede to a request for reconsideration under Regulation 32. However, it had to act reasonably, take relevant factors into account and exclude irrelevant matters. The weight to be attached to the relevant factors was for SPA to decide. The merits of the claim were one relevant factor, but they did not take precedence over other relevant factors, such as delay in bringing a claim.

- The fact that a referral for reconsideration under Regulation 32 was "by agreement" limited the extent to which the Pensions Ombudsman (or the Courts) could interfere with SPA's decision. In such circumstances, the Pensions Ombudsman's role was limited to ensuring the decision-making process had been correctly followed. If the decision-making process was found to be flawed, the Pensions Ombudsman could direct SPA to retake its decision. He could not direct SPA to agree to refer Mr S' case for reconsideration under Regulation 32.

- SPA had said it had declined Mr S' request because: it could see no basis for the assertion that the 2005 and 2010 reviews were wrong or legally untenable; and, making a retrospective assessment of his degree of disablement in 2005 and/or 2010 would be extremely difficult; if not impossible.

- The 2005 review had been undertaken by reference to Regulation K2, the 1987 Regulations and the 2010 review by reference to Regulation 37(1), the 2007 Regulations. The wording of Regulation K2 and that of Regulation 37(1) were, to all intents and purposes, identical and the approach to a review under either regulation should, therefore, be the same.

- Under Regulations K2 and 37(1), SPA shall consider whether the degree of the pensioner's disablement had altered. If SPA found that the degree of the

[16] *Boskovic*

pensioner's disablement had substantially altered, the IOD pension shall be revised accordingly. Regulations H1 and 30 provided that, if SPA was considering whether to revise an injury pension, it had to refer the question of the degree of the person's disablement to a duly qualified medical practitioner selected by it; an SMP. Under Regulation 7(5), degree of disablement was to be determined by reference to the degree to which the pensioner's earning capacity had been affected as a result of the qualifying injury.

- The correct approach to be taken on reviewing an IOD award had been considered by the Courts on a number of occasions. Again, this had been in the context of the relevant regulations applying to England and Wales. However, given that the wording in the relevant regulations was the same or similar to that of Regulations K2 and 37(1), it seemed unlikely that a different approach should be adopted in Mr S' case. It was, therefore, appropriate to consider the caselaw.

- In *Laws*, the judge had said the interpretation of Regulation 37(1)[17] depended upon its relationship with Regulations 30(6) and 31(3), which provided for decisions by the SMP or the PMAB, as the case may be, to be final. The SMP's decision was not to be revisited except on appeal (or judicial review) and the PMAB's decision could only be revisited by judicial review. Regulation 37(1) provided for the police authority to consider "whether the degree of the pensioner's disablement has altered". The authority could only revise an IOD award if the SMP or the PMAB found that the person's degree of disablement, as defined in Regulation 7(5), had substantially altered since the last review.

- It had been argued that the requirement to treat a previous assessment as final did not require acceptance of all the clinical judgments made in or for the purpose of the previous assessment. In *Laws*, this would have meant that the PMAB was free to arrive at its own assessment by a process of reasoning which might involve a departure from earlier clinical judgments. The judge did not accept this argument and said that it did not sit with the language of the regulations. He found that finality did not apply simply to the decision on the percentage of disablement arrived at; it applied to the SMP's decision on the question(s) referred to them and their judgment set out in the reasoned report they were required to provide. Similarly, finality applied to the report from the PMAB. Laws LJ said:

  "So much is surely confirmed by the terms of Regulation 37(1), under which the police authority (via the SMP/Board) are to 'consider whether the degree of the pensioner's disablement has altered'. The premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty - the only duty - is to decide whether, since then, there has been a change: 'substantially altered', in the words of the Regulation. The focus is not merely on the outturn figure, but on the substance of the degree of disablement.

[17] The Police (Injury Benefit) Regulations 2006 (SI2006/932) (as amended)

> In my judgment, then, the learned judge below was right to construe the Regulations as she did. Burton J's reasoning in paragraph 21 of *Turner*, which encapsulates the same approach, is also correct. The result is to provide a high level of certainty in the assessment of police injury pensions. **It is not open to the SMP/Board to reduce a pension on a Regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong**. Equally, of course, they may not increase a pension by reference to such a conclusion; and it is right to note that Mr Butler, appearing for the Board, voiced his client's concern that so confined an approach to earlier clinical findings might in some cases work to the disadvantage of police pensioners. Strictly that is so. But the clear legislative purpose is to achieve a degree of certainty from one review to the next such that the pension awarded does not fall to be reduced or increased by a change of mind as to an earlier clinical finding where the finding was a driver of the pension then awarded." (emphasis added)

- However, the Courts had appeared to take a conflicting view[18] on the degree to which subsequent SMPs or PMABs were bound by a previous diagnosis. The Adjudicator noted that one of the issues raised in connection with the 2005 review was the extent to which Dr Wood had re-visited the qualifying injuries which were the basis for Mr S' original IOD award; in particular, the diagnosis of PTSD.

- The apparent conflict had been resolved in *Boskovic*. The Court of Appeal had decided that an SMP was bound by the answers to the questions posed in Regulation H(1)(a) and (b) of the 1987 Regulations, but not by any diagnosis underpinning those answers. On the question of whether there was any inconsistency with the *Laws* judgment, the judge had said:

  > "At the heart of Mr Lock's argument is his assertion that the fundamental principle, derived from the *Laws* judgment, is that, once a medical authority has reached a decision under the regulations, a later medical authority is bound by what Laws LJ described as the 'essential judgment or judgments' on which the earlier decision is based. It is therefore important to understand the context of the decision in that case. *Laws* concerned a reassessment under regulation 37 of the level of an injury pension already in payment under the regulations. Regulation 37 requires the police pension authority at intervals to consider whether the degree of the pensioner's disablement has altered. If it finds that the degree of disablement has substantially altered, the level of pension must be revised. The only duty on the authority carrying out the review is to decide whether there has been any substantial alteration in the degree of the pensioner's disablement. In all other respects, the requirement of finality which underpins the regulations prevents the authority

[18] In *R (Doubtfire) v Police Medical Appeal Board* [2010] EWHC 980 (Admin), the judge took the view that the SMP and/or PMAB were not bound by a previous diagnosis. In *Evans*, the judge held the opposing view.

carrying out the review from conducting any re-evaluation. It was in that context, therefore, that the Court of Appeal held that it was not open to a SMP, on a periodic review of an injury pension under regulation 37, to revise the level of pension on the grounds that the clinical basis of an earlier assessment of the pension[er]'s degree of disablement had been wrong.

Regulation 32(2) is crafted in very different terms. Unlike regulation 37, which relates to periodic reviews of a pension already in payment, the option of a further reference to the medical authority is unrestricted in time. Furthermore, unlike a regulation 37 review, which only authorises reconsideration of whether the degree of the pensioner's disablement has altered, a further reference under regulation 32(2) may, by agreement, be made in respect of any final decision of a medical authority. **In my judgment, the words 'any final decision' manifestly incorporates not only the decision itself but also evidence on which the decision is based. There is no reason in language, logic or policy to restrict the scope of the reference in the way in which review under regulation 37 is limited.** On the contrary, the purpose of regulation 32(2) is to allow the claimant and police pension authority, by agreement, to avoid an unfair outcome which the finality of decisions might otherwise create." (emphasis added)

- In *Michaelides*, the judge had said *Laws* and *Boskovic* were consistent because, in the former, there was a purpose behind restricting the scope of the reference; whereas, in the latter, there was none.

- In summary, when undertaking a review under Regulation 37(1), the only matter which an SMP and/or PMAB was required/able to consider was whether the pensioner's degree of disablement had altered since the last review. It was not open to the SMP (or the police authority) to revise the IOD award on the grounds that the clinical basis of an earlier assessment of degree of disablement had been incorrect.

- The essence of Mr S' case in relation to the 2005 review decision was that Dr Warnock had erred in accepting Dr Wood's recommendation because Dr Wood had gone further than he was required/able to. In his memorandum of 28 February 2005, Dr Warnock had said:

  "Dr Wood concludes that [Mr S] is suffering from a major depressive disorder, the origins of which are, at least to a degree, connected with his duties as a police officer. It is significant that he does not believe [Mr S] to be suffering from post-traumatic stress disorder.

- This was a departure from the original decision to grant Mr S an IOD award so far as diagnosis was concerned. The original SMP had said he was of the opinion that Mr S was suffering from "a severe post traumatic stress disorder along with a significant depressive illness". Dr Wood had said it was "possible to conceptualise

[Mr S'] case as one of post-traumatic stress disorder further to [Mr S'] involvement in the Dunblane disaster", but he did not think this was the most likely diagnosis, given the pattern of symptoms Mr S had described.

- In the Adjudicator's view, the approach taken by Dr Wood was not the approach required under Regulation 37(1). She acknowledged SPA's point that Dr Wood was not the one to make the decision to revise Mr S' IOD award. However, it was clear that Dr Warnock had based his decision firmly upon Dr Wood's report. He did so without clarifying matters with Dr Wood and, therefore, it would be reasonable to assume that he had been content with Dr Wood's approach. If Dr Warnock had properly understood and adopted the correct approach to a Regulation K2 review, it would have been prudent for him to clarify with Dr Wood what impact his view on the diagnosis of PTSD had on his overall assessment of Mr S' degree of disablement.

- Having said that, the Adjudicator acknowledged that the outcome would not necessarily have been any different even if Dr Wood had been asked to proceed on the basis that Mr S had been diagnosed with PTSD. She noted that Dr Wood had recorded that Mr S had been reasonably successful in his rehabilitation as far as work was concerned. He had thought Mr S had the capacity to build back up to full-time employment in the course of the next year or so. Dr Wood had thought Mr S well suited to the type of role he was then undertaking, which involved the care of people with learning disabilities. Arguably, Dr Wood's assessment of Mr S' degree of disablement in 2005 had been based on his symptoms and work activity at the time, rather than a diagnosis per se.

- In 2010, Mr S had been reviewed by Dr Scott. Having read Dr Scott's report, the Adjudicator was of the view that there was no evidence to suggest that he had not followed the approach required under Regulation 37(1); that is, he had considered only whether Mr S' degree of disablement had altered. She acknowledged that Mr S had said that he had been told that Dr Scott did not agree with Dr Wood's assessment. However, there was no evidence of this in Dr Scott's report and the Adjudicator explained that she could only base her opinion on the report which Dr Scott chose to provide. She noted also that Mr S felt that insufficient notice had been paid to his GP's report. However, Dr Scott had referred specifically to the GP's report and, in her view, his conclusions were not inconsistent with the information provided by the GP.

- The second reason given by SPA for its decision to decline Mr S' request for reconsideration was that, in its view, the elapse of time meant that an assessment of his degree of disablement in 2005 or 2010 was not now possible.

- The question of delay had been considered in *Haworth* and *Boskovic*. In *Haworth*, the judge had said he could not accept that it was lawfully open to a police authority to refuse its consent to reconsideration under Regulation 32(2) simply on the grounds of delay; even inordinate delay. However, he went on to say that the fact of delay was not entirely irrelevant and, in an appropriate case, the delay could be

such that the police authority could legitimately conclude that no fair reconsideration was possible. In *Boskovic*, the judge had said delay was relevant, not only as to whether a fair consideration was possible, but also in its own right. He referred to the public interest in finality in determining an entitlement to a pension and the clear language throughout the regulations which emphasised finality.

- It was open, therefore, to SPA to take account of the delay in Mr S requesting reconsideration of the 2005 and 2010 review decisions as one of the relevant factors in making its decision under Regulation 32(2).

- As to whether the delay in any particular case was sufficient to support a decision to decline a Regulation 32(2) reconsideration was a matter of judgment for the decision-maker. The Adjudicator reiterated that the role of the Pensions Ombudsman was to consider the decision-making process. The Pensions Ombudsman would do so by reference to the approach set out in *Boscovic*; namely, SPA had to act reasonably, take relevant factors into account and exclude irrelevant matters. However, the weight to be attached to any of the relevant factors was for SPA to decide. Provided SPA had followed the correct approach to its decision-making, it mattered not whether the Pensions Ombudsman would, himself, have come to the same decision.

- SPA had concluded that the delay in Mr S' case meant that it would not now be possible to achieve a fair reconsideration of his degree of disablement in 2005 and/or 2010. The Pensions Ombudsman could only interfere in this decision if he concluded that SPA's view was perverse; that is, it was a decision which no other decision-maker could have reached if it had properly advised itself in the circumstances. In the Adjudicator's view, the decision reached by SPA with regard to delay was within the range of possible decisions which might have been reached by a decision-maker acting reasonably.

- In summary, there had been a procedural irregularity in the 2005 review; inasmuch as Dr Wood, upon whose opinion the decision was based, had gone further than he was required/able to do in his assessment of Mr S by revisiting the diagnosis of PTSD. However, it was not at all clear that this had had an undue impact on his overall assessment of Mr S' degree of disablement in 2005.

- The Adjudicator noted Mr S' solicitor's reference to *Michaelides* with regard to the starting point being that an unlawful decision should be quashed unless there was some compelling reason not to do so. In her view, this had to be balanced against the likely outcome of any reconsideration in Mr S' case. It did not always follow that a procedural irregularity warranted setting aside the decision reached[19].

- On balance, the Adjudicator was of the opinion that the Pensions Ombudsman was likely to take the view that Dr Wood's error had not unduly influenced his overall assessment of Mr S' degree of disablement in 2005. On that basis, he would be

[19] *Batt v Royal Mail* [2011] EWHC 900 (Ch)

unlikely to find that there were grounds for him to direct SPA to retake its decision to decline Mr S' request for a reconsideration under Regulation 32(2).

- The Adjudicator noted Mr S' concern that SPA had failed to review his IOD award in 2013, despite the recommendation from Dr Scott. Regulation 37 provided for SPA to conduct a review of an IOD award "at such intervals as may be suitable". SPA had explained that the Scottish Public Pensions Agency had recommended suspension of reviews pending a review of the regulations and that this recommendation was extant in 2013. In view of this and the fact that Regulation 37 did not impose a timeframe for reviews, it was her opinion that SPA's failure to review Mr S' IOD until his request in 2015 did not amount to maladministration.

- On the basis that the Scheme was an occupational pension scheme, SPA should have allowed Mr S to pursue his complaint via the IDRP. Its refusal to do so might be considered maladministration on its part. However, in the Adjudicator's view, Mr S had not sustained any injustice as a consequence because he had not been prevented from pursuing his case to the Pensions Ombudsman.

- The Adjudicator acknowledged the particularly difficult circumstances Mr S had faced both before and after leaving the police force and that her opinion would not be the outcome he had been hoping for.

24. Mr S did not accept the Adjudicator's Opinion and his complaint was passed to me to consider. Mr S' solicitor provided further comments on his behalf which are summarised below. I have considered Mr S' comments but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Mr S' further comments

25. Mr S' solicitor has made the following further submissions on his behalf:-

- Mr S did not receive a copy of Dr Warnock's report until 2015. This is germane to the issue of time and *Boskovic*. It is clearly significant because it compounds the unlawful approach taken by Dr Wood. This is not a procedural irregularity; rather, it is indicative of perverse actions.

- Mr S was and remains unwell. He is clearly disabled for the purposes of equality legislation. It is perverse that SPA cannot disclose a document for years, thereby negating any chance of appeal, and then rely on delay not to grant an extension of time, which is at its discretion.

- Mr S' position as to whether Dr Warnock's decision was one he could lawfully make is maintained on the basis that his diagnosis could not be changed.

- With regard to the 2013 review of regulations, many forces in England and Wales are reviewing injury awards. It is perverse for SPA to rely on this review when no update has been provided some nine years later. Furthermore, the Scottish Public Pensions Authority (**SPPA**) website states that SPA can review injury awards.

Ombudsman's decision

26. There is a time limit within which an application may be made to me. Ordinarily, an application must be made within three years of the occurrence of the matter which is the subject of the complaint, or within three years of the applicant becoming aware of the matter. I have some discretion to consider applications received outside of this timeframe. In Mr S' case, my Adjudicator noted that events surrounding the 2005 and 2010 reviews of his IOD award fell well outside the usual timeframe for applications to me. However, she also acknowledged that it would not be possible to consider his request for a review under Regulation 32(2) without looking at the earlier reviews to some extent. This is not to say that this provides a carte blanche for me to consider the 2005 and 2010 reviews.

27. I note that, on completion of each review, Mr S was informed of his right of appeal. With regard to the 2005 review, Mr S was provided with a copy of his personnel file, at his request, and asked to confirm whether he wished to appeal. He did not proceed to an appeal. In 2010, Mr S was again informed of his right of appeal and he was sent a copy of Dr Scott's report.

28. Mr S' solicitor has said that Mr S was not provided with a copy of Dr Warnock's report until 2015. This is put forward as a reason why a referral under Regulation 32(2) would be appropriate and also for extending the relevant time limits. However, Mr S would have known, in 2005, if he had not been provided with a copy of the SMP's report and he would have been reminded of this on receipt of Dr Scott's report in 2010. He had the opportunity to ask for a copy of Dr Warnock's report in 2005 and again in 2010.

29. Whilst I acknowledge that Mr S has been in poor health for much of the period in question, in 2005, he had requested a copy of his personnel file with a view to preparing an appeal. This does not suggest that he was unable to engage with his IOD award at that time. In 2010, Mr S' mood had been described as brighter and less anxious by his GP. Dr Scott noted that Mr S had spoken fluently and well about his police history during their consultation. He noted that Mr S had been discharged from the psychology service in October 2006 and he had not required further referral to a psychiatrist or a psychologist. Again this does not suggest that Mr S was unable to engage with his IOD award at that time. I do not find that I have grounds to extend the time limits for bringing a complaint to me regarding the 2005 and 2010 reviews in and of themselves. I will, therefore, look at the 2005 and 2010 decisions only insofar as it is necessary in order for me to consider Mr S' complaint about SPA's decision not to agree to refer his case for review under Regulation 32(2).

30. As my Adjudicator explained, because a referral for reconsideration under Regulation 32 is "by agreement", the extent to which I (or the Courts) can interfere with SPA's decision is limited. My role is to consider whether the decision-making process has been correctly followed. If I find the decision-making process to be flawed, I can direct SPA to retake its decision, but I cannot make the decision in its place.

31. The decision-making approach which SPA can be expected to follow when it is asked to consider a referral under Regulation 32(2) was set out in *Boskovic*; namely, SPA has to act reasonably, take any relevant factors into account and exclude any irrelevant matters. However, the weight to be attached to any of the relevant factors is for SPA to decide.

32. Essentially, SPA has declined to agree to Mr S' request for a review under Regulation 32(2) on the grounds that:

    - the elapse of time since the 2005 and 2010 reviews means that it is now not possible for a medical practitioner to assess Mr S' degree of disablement at the relevant times; and

    - there is no evidence that the 2005 and 2010 reviews were wrong or legally untenable.

33. One of the relevant factors which SPA may take into account is delay. Whether the delay is sufficient to support a decision to decline a request for a Regulation 32(2) reconsideration is a matter of judgment for SPA.

34. Undoubtedly, a delay of the magnitude involved in Mr S' case would have a significant impact on the likelihood that any medical practitioner would be able to now undertake a proper assessment of his degree of disablement in 2005. SPA is of the view that it would not now be possible to make a retrospective assessment of his degree of disablement in 2005. I find that this view is within the range of possible positions which a reasonable decision-maker, properly directing itself, could hold. It cannot be described as perverse in the circumstances.

35. Mr S' solicitor has suggested that it is perverse for SPA to decline to refer Mr S' IOD award for review, under Regulation 32(2), on the grounds of delay when it did not provide him with a copy of Dr Warnock's report until 2015. As discussed, Mr S had the opportunity to address this omission in 2005 and again in 2010. I do not find that any failure to provide Mr S with a copy of Dr Warnock's report is evidence of perversity on SPA's part.

36. With regard to Dr Warnock's decision, I concur with my Adjudicator's assessment. Dr Warnock's decision was largely based upon the report from Dr Wood and the evidence indicates that Dr Wood went further, in his assessment of Mr S, than he was required to, or allowed to, under Regulation H1, the 1987 Regulations. It appears that Dr Wood took a view as to an appropriate diagnosis for Mr S, rather than simply assessing whether his degree of disablement had altered. However, Dr Wood clearly did also consider Mr S' degree of disablement. He expressed the view that Mr S should be regarded as having "a long term minor degree of disability", which was "significantly less than the 50 to 75% disability" calculated three years previously. This assessment was based upon his view that Mr S had been reasonably successful in his rehabilitation for work and had the capacity to build up to full-time employment in the course of the next year or so. It is not obvious that Dr Wood's assessment of

Mr S' degree of disablement in 2005 would have been any different if he had not commented also on diagnosis.

37. Mr S' solicitor argues that Dr Warnock's decision, that Mr S' degree of disablement had substantially altered, was not one which he could lawfully make. This is on the grounds that Dr Wood had erred in revisiting Mr S' diagnosis.

38. In *Laws*, the judge said:

> "It is not open to the SMP/Board to reduce a pension on a Regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong."

39. If Dr Wood had said that Mr S' degree of disablement should not be considered to be in the 50 to 75% category because the previous assessment had been based upon a misdiagnosis, Mr S' argument might have some strength. However, this was not the case. Although Dr Wood did express a view as to the appropriate diagnosis for Mr S, his assessment was based upon Mr S' then capacity for employment. I find that Dr Wood's straying into the territory of diagnosis should be viewed as a procedural irregularity, but it would not be sufficient to warrant setting aside Dr Warnock's decision.

40. In the circumstances, SPA's position that the 2005 and 2010 reviews were not fundamentally flawed cannot be described as perverse.

41. Finally, Mr S' solicitor has suggested that SPA's reference to a review of the Police injury benefit regulations being undertaken in 2013 is perverse. He has pointed to the SPPA website, which refers to reviews of injury benefits by SPA. However, I take SPA to be referring to the position as it was in 2013; not that it considered this a reason for not reviewing Mr S' IOD award now under Regulation 32(2).

42. I do not uphold Mr S' complaint against SPA.

Anthony Arter
Pensions Ombudsman

28 March 2022

Appendix 1

The Police Pension Scheme Regulations 1987 (SI1987/257) (as amended)

43. At the time Mr S' IOD award was reviewed in 2004/05, Regulation A12 "Disablement" provided:

> "(1) 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.
>
> (1A) For the purpose 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 authority for that person to refuse.
>
> (2) Subject to paragraph (3), disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force ...
>
> (3) 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: …
>
> (4) ...
>
> (5) In this regulation, "infirmity" means a disease, injury or medical condition, and includes a mental disorder, injury or condition."

44. Regulation H1 "Reference of medical questions" provided:

> "(1) Subject as hereinafter provided, the question whether a person is entitled to any and, if so, what awards under these Regulations shall be determined in the first instance by the police authority.
>
> (2) 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;
>
> 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;

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

45. Regulation K2 "Reassessment of injury pension" provided:

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

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

The Police (Injury Benefit) (Scotland) Regulations 2007 (SSI2007/68) (as amended)

46. Regulation 7 "Disablement" provides:

"(A1) This regulation applies in relation to a member of a police force who is a member of the 1987 scheme or 2006 scheme, and who is not a member of the 2015 scheme, at the time when the question as to whether the person is permanently disabled arises under these Regulations for decision.

(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, …

(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 their disablement, and in this paragraph "appropriate medical treatment" shall not include medical treatment that it is reasonable in the opinion of the police 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 police 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 their earning capacity has been affected as a result of an injury received without their own default in the execution of their duty as a member of a police force …

(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.

(7) Where a person has retired before becoming disabled …

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

47. Regulation 30 "Reference of medical questions" provides:

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

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

(a) whether the person concerned is disabled;

(b) whether the disablement is likely to be permanent,

except that, in a case where those questions have been referred for decision to a duly qualified medical practitioner under regulation H1(2) of the 1987 Regulations, … a final decision of a medical authority on those questions under Part H of the 1987 Regulations, … shall be binding for the purposes of these Regulations; and, if they are further considering whether to grant an injury pension, shall so refer the 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,

and, if they are considering whether to revise an injury pension, shall so refer the question in sub-paragraph (d).

(3) …

(4) ...

(5) The police authority may decide to refer a question in paragraph (2) … to a board of duly qualified medical practitioners instead of to a single

duly qualified medical practitioner, and in such a case references in this regulation, regulations 31 and 32 and paragraphs 6(1)(a) and (2) of Schedule 6 to a medical practitioner shall be construed as if they were references to such a board.

(6) The decision of the selected medical practitioner on the question or questions referred to them under this regulation shall be expressed in the form of a report and shall, subject to regulations 31 and 32, be final.

(7) A copy of any such report shall be supplied to the person who is the subject of that report."

48. Regulation 32 "Further reference to medical authority" provides:

(1) ...

(2) The police authority and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to that medical authority for reconsideration, and the medical authority shall accordingly reconsider the 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 the claimant has given notice (before referral of the decision under this paragraph) be notified to the Scottish Ministers under regulation 31, shall be final.

(3) If … a claimant and the police authority agree, to refer a decision to the medical authority for reconsideration under this regulation and that medical authority is unable or unwilling to act, the decision may be referred to a duly qualified medical practitioner or board of medical practitioners … agreed upon by the claimant and the police authority, and the duly qualified medical practitioner's or board of medical practitioners' decision shall have effect as if it were that of the medical authority who gave the decision which is to be reconsidered.

(4) In this regulation a medical authority who has given a final decision means the selected medical practitioner, if the time for appeal from their decision has expired without an appeal to a board of medical referees being made, or if, following a notice of appeal to the police authority, the police authority have not yet notified the Scottish Ministers of the appeal, and the board of medical referees, if there has been such an appeal."

49. Regulation 37 "Reassessment of injury pension" provides:

"(1) Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the police authority shall, at such intervals as may be suitable, consider whether the degree of the

pensioner's disablement has altered; and if after such consideration the police authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly. …"

Appendix 2

Medical evidence

50. The medical evidence submitted in relation to Mr S' case is extensive. It would not be practical to provide summaries of all of the reports provided. The various medical reports dating from 2002 and 2003 have been reviewed, but are not summarised below.

51. Dr Wood, Consultant Forensic Psychiatrist, 9 February 2005

    Dr Wood provided his report after having examined Mr S, including asking him to complete a number of psychometric tests, which were then scored by a clinical psychologist.

    Dr Wood's report is comprehensive and it would not be practical to reproduce it in full here. In the section headed "Opinion", he said:

    > "I am of the opinion that [Mr S] has suffered from a severe depressive illness (Major Depressive Episode). Part of the history suggests that there may have been psychotic features to this, given the beliefs expressed concerning disasters.
    >
    > [Mr S'] depression developed in the late 1990's against a background of deteriorating health from the early 1990's onwards and particular concern over his part in the Dunblane enquiry.
    >
    > Whilst it is possible to conceptualise this case as one of post-traumatic stress disorder further to [Mr S'] involvement in the Dunblane disaster, I do not think this is the most likely diagnosis, given the pattern of symptoms described here. It is understandable that [Mr S] should blame his involvement in this event and in the following enquiry for his symptoms.
    >
    > The cause of depressive illness is a complex issue with genetic and environmental features playing a part and it is probable that multiple stressors, including [Mr S'] specific feelings in relation to his role in the Dunblane enquiry are likely to have been of significance here.
    >
    > [Mr S'] depressive illness has been compounded by his excessive drinking which is now under control.
    >
    > [Mr S'] depressive illness has now fallen to the level of Dysthymic Disorder as defined in DSM IV. He has been reasonably successful in his rehabilitation, as far as work is concerned, and has the capacity to build back up to full-time employment in the course of the next year or so, should this be available to him. He is well suited to the type of role he is currently undertaking for his friend's firm, which involves the care of people with learning disabilities.
    >
    > [Mr S] should be regarded as having a long term minor degree of disability, significantly less than the 50 to 75% disability calculated 3 years ago. I

estimate this to be in the 15 to 25% zone at present, falling to the 5 to 10% range within the next 12 months. The continuing disability here is principally in the form of [Mr S'] long term vulnerability to further episodes of depression, particularly in the face of adverse life events.

[Mr S] requires long-term prophylactic treatment in order to minimise the risk of further episodes of depression, together with a particular need to control his intake of alcohol very strictly."

52. Dr Warnock, 4 April 2005

In a memorandum to the Deputy Chief Constable, Dr Warnock said:

"I have been asked to comment on a report recently obtained from Dr Peter Wood. In that case, he recommended reducing the level of injury award and I believe that this was the only course of action, other than maintaining the status quo, open to him. The report is well constructed, in "medico-legal" format, reflecting Dr Wood's main current professional activity, assessing compensation cases.

Where I would differ from Dr Wood is in his acceptance of the primary underlying disorder. He uses orthodox psychometric tools (questionnaires) and applies DSM-IV (the American classification of mental illness) in a fairly straightforward way to arrive at his conclusions.

My own view is that such questionnaire and the criteria set out in DSM-IV need very cautious use in the context of real or imagined conflict, all the more so if there is a financial interest. We see an epidemic today of the "medicalisation" of unhappiness, and I think there are many such cases which are open to other interpretations.

A straightforward medical model (i.e. the person has been made ill by adverse events) has severe limitations and demonstrably is not serving society very well. The Prime Minister has recently drawn attention to this explosion in apparent incapacity and the need for change, views with which I would entirely agree.

Of course some people do become ill. However, many of the problem cases which arise in the police context are characterised by disenchantment, perceived conflict, the adoption of the sick role and illness behaviour, with obvious financial imperatives to motivate and sustain such behaviour. Health is only one factor in a complex social situation that involves personal, motivational and financial issues.

There is a difficulty in sourcing robust and challenging psychiatric opinions. Psychiatrists and psychologists have to a degree a vested interest in this culture of disability. It is also safer and easier to collude with the patients than

to take a contrary view, and risk conflict, complaints, abuse, perhaps even violence, and possible legal proceedings.

Dr Wood did take a robust view of the prognosis in this case but I am not certain how helpful his involvement would be in the majority of cases. I am trying to source alternative psychiatric opinions in connection with other clients, and I will advise you if I can identify some doctors whose views are likely to be constructive."

53. Ms Gray-Taylor, Chartered Clinical Psychologist, 25 July 2005

In a letter to the counselling psychologist who had referred Mr S to her, Ms Gray-Taylor described the treatment provided for him. She explained that the treatment sessions had focused on the difficulties which Mr S experienced on a day-to-day basis; particularly, cognitions and interpretations of events which led to alterations in his mood and, at times, to suicide related behaviours. Ms Gray-Taylor concluded:

"Currently, depressive symptoms are less severe and the periods between those episodes of low moods are longer. At our session today [Mr S] was expressing concerns about the review of the terms of ill health retirement which have reduced his pension considerably. He has the option of appealing against this decision and, if he decides to take this course of action, updated reports will be required from those of us involved in his treatment. I have therefore agreed to send a copy of this letter to [Mr S] as well as to his GP.

In the meantime, I have a further appointment to see [Mr S] in two weeks' time."

54. Dr McGregor, GP, 15 September 2010

Dr McGregor said she had seen Mr S fairly regularly since 2004. She said, since 2004, Mr S had suffered from a background level of anxiety and symptoms of depression. She said he had required fairly regular medication and provided details of Mr S' current medication. Dr McGregor said Mr S had been seen by a psychologist with symptoms of PTSD and clinical depression. She said he had been discharged in October 2006. Dr McGregor explained that Mr S had suffered high anxiety levels, poor sleep and low mood over recent years, particularly at time of stress. She said, when reviewed in August 2010, Mr S' mood appeared to be brighter and he seemed less anxious. She explained that he had attributed this to resigning from his previous employment.

Dr McGregor concluded:

"In summary, I feel that [Mr S] has a background level of anxiety and depressive symptoms. However, these are exacerbated at time of personal stress and he would not be fit to return to a stressful working environment."

55. Dr Scott, SMP, 27 October 2010

In a letter to the SPA, Dr Scott explained that he had read Mr S' occupational health file and reports from psychiatrists and psychologists who had seen Mr S between 2004 and 2006. He had also met with Mr S.

Dr Scott noted that Mr S was under the care of his GP, whom he saw every few weeks. He noted Mr S was on medication for depression, anxiety and insomnia. Dr Scott said Mr S' health had fluctuated over the past few years. He noted that Mr S had undertaken some work in 2005 for nine months before being forced to leave on health grounds. He noted that Mr S then had returned to work in 2007 before leaving on health grounds in 2009. Dr Scott noted Mr S had had problems with alcohol but this had reduced and he had regular monitoring from his GP.

Dr Scott concluded:

> "During the consultation he showed features of anxiety but he spoke fluently and well about his police history and the trauma of Dunblane and the subsequent Cullen Inquiry. There were moments when he became quite emotional.
>
> He has obviously struggled with stressful full time work, but he is determined to make further attempts. Dr McGregor stated that he was finally discharged from the psychology service in October 2006 and he has not required further referral to a psychiatrist or a psychologist.
>
> I am of the opinion that [Mr S] will continue to make progress although there will be time when his mental state will relapse."

56. Dr Watt, SMP, 16 March 2016

In a letter to the SPA, Dr Watt said he had conducted the review under Regulation H1(2)(c) and (d) and Schedule B of the 1987 Regulations. He noted that he had not had access to the Certificate of Retirement.

Dr Watt noted that the reason for Mr S' retirement had been psychological in nature and referred to a diagnosis of Depression and PTSD. He said there was evidence in the occupational health file of the diagnoses and attribution to an injury on duty. Dr Watt said Mr S had described a mood disorder in relation to past work circumstances which continued to disable him in most aspects of daily living. He said Mr S' mental health had not improved since retirement and he had recently been referred for further psychological help. Dr Watt noted that Mr S was now diabetic and his hearing had declined.

Dr Watt concluded:

> "It is 14 years since [Mr S] was retired from police service on health grounds and during that period he estimates that he has worked for a total of 3 years. During these years of work he earned an estimate £45,000 per annum. He last

> worked in 2009. I found information from you within the file that suggested that his salary at the time of retirement approached £60,000. A rough calculation of 14 years at £60,000 compared to £45,000 for 3 years leads me to conclude that his earnings disadvantage caused by ill health since retirement has been substantial. I believe that it is reasonable to assume that this disadvantage is caused by the disability that was the reason for his retirement and represents a Major Degree of disability in employment terms of between 51% and 75% in the terms of the Police Pension Regulations 1987."

57. Dr Morris, Clinical/Counselling Psychologist, 10 May 2017

In a letter to SPA, Dr Morris said she was writing to highlight Mr S' current level of functioning in relation to his continuing mental health issues. She said ongoing mismanagement of Mr S' retirement had caused further deterioration in his mental health. Dr Morris said this had meant he had needed extensive psychological therapy. She explained that Mr S had been receiving therapy from one of her colleagues from 2002 to 2011 and had been re-referred to the Clinical and Counselling Psychology Service by his GP in 2016. Dr Morris expressed the view that Mr S' symptoms continued to be sufficiently significant to impact severely upon his everyday functioning. She said Mr S' symptoms concurred with the criteria for Chronic Post-Traumatic Stress Disorder and a major depressive disorder[20]. Dr Morris said, although recent improvement had been seen, Mr S continued to be significantly impaired. She anticipated that Mr S would need psychological therapy for the foreseeable future.

Dr Morris concluded:

> "In considering the scale of mental health deterioration and the reduced capacity to cope from 2002 onwards I would concur that [Mr S] would not have been mentally fit to engage fully in anything considered to be anxiety provoking which could act as a trigger back to the Dunblane incident, the Police and how he had been treated … From what has been stated and recorded by [Mr S] it would appear that such Police conduct and mistreatment would have detrimentally affected this individual's mental health … It would appear that [Mr S] has been severely disadvantaged in his capacity to comprehend, understand and respond fully to basic expectations made of him … I also support [Mr S'] preference for no unnecessary contact with the [SPA] in future given that such contact can cause this patient such emotional distress and mental health deterioration. It is hoped that [Mr S] can at some point in the near future maintain a level of prolonged mental health to enable improved day to day functioning."

[20] Dr Morris referred to the Diagnostic and Statistical Manual for Mental Disorders, 5th Edition Text Revision (DSM-V-TR), American Psychiatric Association, 2015.