

Ombudsman's Determination

Applicant	Mr S
Scheme	Police Pension Scheme (the Scheme)
Respondent	Avon and Somerset Police Pension Authority (the Authority)

Outcome

1. Mr S' complaint against the Authority is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, the Authority should pay Mr S £500 for the significant distress and inconvenience it caused.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S' complaint is that his level of disablement has been changed from 75-100% to 90% during a review, which he believes is incorrect and could impact any future reviews negatively. He has also raised concerns over the accuracy of the medical report completed during the reviews and the delays he experienced.

Background information, including submissions from the parties

4. Mr S was awarded a Band 4 permanent injury benefit (**PIB**) in 2002. The certificate he was issued states his disablement as 75-100%. In 2002 the relevant Regulations were The Police Pensions Regulations 1987 (**the 1987 Regulations**). Regulation K2 referred to review of the PIB:-

“K2 Reassessment of injury pension

- (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....”

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5. The 2002 certificate completed by the selected medical practitioner (**SMP**) states “I recommend that the police authority should consider in 12 months’/years’ time whether the degree of disablement has altered.” The SMP had filled in “12” but appears to have neglected to delete either “months” or “years”.
6. The 1987 Regulations were updated and replaced by The Police (Injury Benefit) Regulations 2006 (**the 2006 Regulations**). Under Regulation 37 the PIB can be reviewed:-

“37 Reassessment of injury pension

(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....”
7. In May 2014, the Authority wrote to Mr S informing him that a review of his PIB would be carried out. He was seen by a SMP on 17 December 2014. The SMP issued a report in July 2015 stating that there was no significant change to Mr S’ disablement but that the original certificate was incorrectly completed and did not attribute an exact percentage to his disablement. The SMP provided a percentage figure of 90% for Mr S’ disablement.
8. On 3 September 2015, the Authority notified Mr S of the outcome of the review, which was in line with the SMP’s findings, meaning that he remained in Band 4 and his injury benefit award did not change.
9. Mr S complained about the following issues under the two-stage internal disputes resolution procedure (**IDRP**): (i) if there was no significant change, the disablement percentage did not require amendment under the Regulations; (ii) the Regulations no longer require the SMP to issue a certificate but that a report should be issued instead; and (iii) he was concerned regarding the accuracy of the facts within the SMP’s report as he believed there were a number of inaccuracies. He would like the review and the SMP’s report to be removed from his record so they cannot have a negative impact on any future reviews.
10. In addition, Mr S raised concerns about the time taken to perform the review and the appeals process that followed. The process began on 29 May 2014 when he was issued the letter informing him of the review. The decision of the review was issued on 3 September 2015 and the stage two IDRP was issued on 21 June 2016.
11. The Authority has apologised for the length of time taken during the whole process and acknowledged that its customer service was poor. It maintained that Mr S’ PIB had not been altered and that while the SMP may have produced a document labelled a certificate, he had also produced a report. It said that if Mr S had concerns

over the SMP's report that these should be raised as an appeal to the board of medical referees under the 2006 Regulations.

12. On 12 June 2017, Mr S was issued a letter stating that no further reviews would be carried out at present and any reviews in process will be stopped immediately. It has since been confirmed that this decision does not affect Mr S as his review had already been completed and resulted in him remaining in Band 4, the highest band available.

Adjudicator's Opinion

13. Mr S' complaint was considered by one of our Adjudicators who concluded that further action was required by the Authority. The Adjudicator's findings are summarised briefly below:-

- The Regulations allow for a review to be carried out at suitable intervals, and Mr S' 2002 certificate states that a review should be carried out but it is unclear if a 12 month or a 12 year period was proposed.
- The fact that the Authority made the decision to carry out reviews in May 2014 and then later, in June 2017, discontinued them does not necessarily mean that the reviews that were carried out were flawed. The Authority has not removed or rescinded the reviews already completed which suggests that is satisfied that they were completed correctly.
- Mr S' complaint is that his level of disablement has been changed from 75-100% to 90% during the review, and that this should only have been done if there was a significant change. Despite this change, Mr S has suffered no loss. He has remained in the highest band of disablement and his award has not been altered. The Authority said that this change was made as the Regulations require a specific percentage to be stated and this was not done in 2002.
- It is necessary to determine the degree of disablement in order to calculate the PIB payable. The Adjudicator said it seems reasonable that the Regulations intended this to be a specific percentage, as it does not say band of disablement. Nevertheless, PIB is calculated using the same method for a degree of disablement from 76% to 100%. Mr S appears to view the 90% he has been awarded as a reduction, but this is not necessarily the case.
- While the Regulations regarding the reassessment of a PIB state that a review is to "consider whether the degree of the pensioner's disablement has altered; and if after such consideration the police pension authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly." An award could only be amended where the substantial change took the member into a different band of disablement. Therefore, it would be possible for a change in disablement percentage to occur without the need for amendment,

as has happened in this case. The important point here is that Mr S has not suffered a financial loss as a result of the change in his disablement percentage.

- The adjudicator noted that Mr S said there are a number of errors in the SMP's report. These are detailed in his letter dated 8 September 2015 and mostly centre on the SMP making comments or findings which fall outside of his duty as an SMP reviewing a PIB. The SMP is required to consider whether the degree of disablement has altered. The SMP's role is not to question the original decision, make a diagnosis, or create medical evidence. Nevertheless, the SMP has reached a finding that the degree of disablement is 90%, which has not substantially altered or caused Mr S' PIB to be amended, so no loss has occurred as a result of any errors in the SMP's report.
- Mr S is concerned that the SMP's report could impact any future review negatively. However, the adjudicator said this is unlikely as the intention of a review is to consider the disablement at that point in time. In any case the Pensions Ombudsman, and his office, cannot make a finding on a perceived future loss which may not come to pass.
- The Authority has agreed that there was an unreasonable delay in the review of Mr S' PIB but has not made an award in respect of the distress and inconvenience caused to Mr S as a result of this delay the Adjudicator said that the delay amounts to maladministration and that this has caused Mr S significant distress and inconvenience, for which the Authority should pay him £500.

14. The Authority accepted the Adjudicators Opinion and agreed to pay the £500 suggested. However, Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which are summarised below:-

- The Adjudicator comments on the legitimacy of the review which Mr S had not mentioned.
- The judicial reviews of Fisher and Simpson say that a change to the disablement percentage is only permissible if there has been a substantial change yet the Adjudicator has ignored these reviews on the basis that there has been no financial loss, but financial loss should not determine whether the point should be upheld or not.
- The matter of the errors in the SMP's report has not be satisfactorily addressed.
- The Authority has failed to reason his injured earning capacity is 90% and this moves Mr S away from evidencing 100% (which could have been argued previously as he was in a range inclusive of this figure). The disablement percentage is based on earning capacity and awarding 90% suggests that Mr S has a 10% capacity to work. In fact Mr S is unable to work at all and has not been employed since leaving the Police. He is also in receipt of a Personal Independence Payment (**PIP**) which supports his total incapacity for employment.

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- There is importance of having 100% disablement within the 2006 Regulations in that where considered incapable of earning any money in any employment this qualifies that person for “total disablement”. Total disablement allows them to be considered for a disablement gratuity under Regulation 12 of the 2006 Regulations. While it has been acknowledged that Mr S is out of time for this he says that he could potentially appeal under Regulation 32 and in effect reopen the opportunity for consideration under Regulation 12.
15. The comments do not change the outcome. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Mr S for completeness.

Ombudsman’s decision

16. The Pensions Ombudsman’s role in ill health and PIB cases is to consider whether the correct process has been followed. This is why the Regulations allowing for reviews to be carried out have been considered by the Adjudicator. It is acknowledged that Mr S has not raised this point but it has been addressed as part of the process in considering this complaint. The Regulations allow for reviews to be carried out, but this statement does not mean that the Authority must carry out reviews, simply that it is able to under the Regulations. There may be circumstances where a review is not appropriate.
17. Where the correct process has not been followed, the case would be remitted back to the decision maker to consider afresh. I cannot request that the review is removed from a member’s record, as Mr S has requested in his application form. However, I do not consider that the Authority has performed the review of PIB incorrectly.
18. The Authority has said that Mr S’ disablement has not altered, and his award has not been altered. It has assigned a specific percentage to his earning capacity as it considered that the previous non-specific banding was incorrect. The Regulations do not prescribe a set method for the Authority to follow in assessing Mr S’s earnings capacity in determining the degree of disablement. It was open to the Authority to decide in accordance with Regulation 37 how it assessed and expressed it. So it had not acted outside the scope of the Regulations by using a specific percentage. In any event Mr S has not been disadvantaged by the change, for this point to be upheld there would need to be maladministration which has resulted in an actual financial loss to Mr S, which is not the case.
19. Mr S has suggested that there has been a failure to substantiate a decision that his earning capacity is 90%. I do not agree. The SMP’s report states “It is not reasonable to suggest that [Mr S] is 100% disabled, as he is clearly able to undertake some tasks, even though they may be within certain constraints and not on a sustained basis. I would therefore suggest that a figure of 90% would be a reasonable estimate of the degree to which his earning capacity is affected.” I consider this to be the explanation for the 90% awarded, and that it is sufficient for this purpose. The Authority is not required to consider Mr S’ eligibility for PIP, nor

does Mr S' receipt of PIP necessarily confer a right to 100% disablement in respect of PIB. The tests are for different awards and they cannot be directly compared.

20. With regard to the additional comments made in the SMP's report I agree that the Regulations exclude this and it was not necessary for them to have been given consideration. The correct method for addressing this aspect would be an appeal to a board of medical referees. However, since this was included in the complaint brought to this office I will consider it here. The errors Mr S has raised have not resulted in any detriment or loss, and were I to uphold Mr S' complaint in this respect I would refer it back to the Authority for re-consideration. Effectively, if upheld, this means that the Authority would need to appoint a new SMP to review Mr S' condition. I see no benefit in taking such action which will result in Mr S going through another review, with the inevitable stress that he would be caused, when there has been no change to his PIB award.
21. Mr S has said that there is a failure to recognise the importance which should be given to having 100% disablement within the 2006 Regulations. I do not agree that this is relevant to Mr S' case. Mr S qualified for PIB in 2002 under the 1987 Regulations. In the 1987 Regulations the gratuity Mr S refers to, called an injury award, was automatically payable under Regulation B4, where someone is permanently disabled as a result of an injury received in the execution of his duty, as in Mr S' case. The Authority has confirmed that Mr S was granted an injury award in addition to his PIB and so Mr S would not be in a position to claim it again under the 2006 Regulations.
22. Therefore, I partly uphold Mr S' complaint on the basis that the delays caused by the Authority amount to maladministration and I consider that an award is merited for the significant distress and inconvenience that this caused.

Directions

23. Within 28 days of the date of this Determination the Authority shall pay Mr S £500 for the significant distress and inconvenience he has suffered.

Anthony Arter

Pensions Ombudsman
20 December 2017