

PO-7548

Ombudsman's Determination

Applicant	Mr X
Scheme	Police Injury Benefit Scheme (Northern Ireland)
Respondent(s)	Northern Ireland Policing Board (NIPB)

Complaint summary

Mr X has complained that the NIPB have refused to refer his case for review under regulation 31(2) of the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against the NIPB because they have failed to take steps to establish whether or not Mr X is in receipt of the correct level of benefit.

Detailed Determination

The Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006 (SI2006/268) (as amended)

1. Regulation 31(2) states,

“The Board and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him for reconsideration, and he shall accordingly reconsider his decision and, if necessary, issue a fresh report and certificate, which, subject to any further reconsideration under this paragraph or paragraph (1) or an appeal, where the claimant requests that an appeal of which he has given notice (before referral of the decision under this paragraph) be notified to the Secretary of State, under regulation 30, shall be final.”

2. Regulation 31(4) states,

“In this regulation a medical authority who has given a final decision means the selected medical practitioner, if the time for appeal from his decision has expired without an appeal to an independent medical referee being made, or if, following a notice of appeal to the Board, the Board has not yet notified the Secretary of State of the appeal, if there has been such an appeal.”

3. Regulation 35(1) states,

“... where an injury pension is payable under these Regulations, the Board 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 Board find that the degree of the pensioner’s disablement has substantially altered, the pension shall be revised accordingly.”

Material Facts

4. Mr X was awarded an injury benefit in 1999. His award has been reviewed on a number of occasions: 2004, 2007, 2009 and 2012. Mr X has applied to the Pensions Ombudsman on two previous occasions in relation to the review of his injury benefit award.
5. The then Deputy Pensions Ombudsman issued determinations in April 2013, and one in April 2014. The first determination concerned the 2009 review of Mr X’s injury benefit. Mr X’s complaint was upheld. The Deputy Ombudsman found that the review had not been carried out in accordance with the above regulations and it was maladministration on the part of the NIPB to reduce Mr X’s award on the basis of a flawed review. She found that Mr X was entitled to receive injury benefit at the higher rate determined at the previous review (2007) until a further review had been carried out in accordance with the above regulations. The NIPB were directed to pay Mr X arrears.

6. Whilst the 2009 review was being investigated by the Deputy Ombudsman, the NIPB agreed to refer the matter back to the Principal Independent Medical Referee (**PIMR**), Dr D, under regulation 31(2). This review was the subject of Mr X's second application to the Pensions Ombudsman. The Deputy Ombudsman upheld Mr X's complaint on the grounds that the 2012 review had not been carried out in accordance with the above regulations. She determined that Mr X's benefit should not have been reduced in reliance on the 2012 review and that he should be paid at the 2007 rate until such time as it was properly reviewed.
7. Mr X wrote to the NIPB, on 18 May 2014, seeking their agreement to refer his case back to the Independent Medical Referee (**IMR**) under regulation 31(2).
8. On 23 June 2014, Dr D wrote to the Department of Justice saying he had met with Mr X. He said Mr X had made him aware of the Deputy Ombudsman's determinations. Dr D said it was clear that the Deputy Ombudsman had determined that he was in error in relation to the review of Mr X's injury benefit. He said he accepted this and had apologised to Mr X. Dr D said he was writing to confirm that, following his assessment of Mr X in the summer of 2011, he considered him to be totally incapable of working as a police officer, i.e. 100% disabled. Dr D said no apportionment should have been applied for either musculoskeletal problems or constitutional psychological factors.
9. The NIPB wrote to Mr X, on 11 August 2014, saying they now had the legal advice they had sought on his request. They said that, given the Deputy Ombudsman's decisions had quashed their decisions (in 2009 and 2012), Mr X was now back in the position after the 2007 review. The NIPB said it was not possible for them to agree to a reconsideration of the IMR's report and certificate because they no longer stood. They suggested Mr X request a review of his injury benefit if he thought his condition had deteriorated and enclosed some forms for him to complete. The NIPB went on to say reviews were currently suspended pending the outcome of a review by a Senior Counsel. They said a list was being kept of all requests for processing once reviews recommenced. The NIPB said they would honour the date of Mr X's original request (18 May 2014).
10. The reference to a review by Senior Counsel is to a review into the procedure by which injury benefits were reviewed carried out by Mr Scofield QC. This was completed in November 2014.
11. A number of letters were exchanged between Mr X and the NIPB during September and October 2014. Mr X's solicitors then wrote to the NIPB, in November 2014, requesting the 2012 review be referred under regulation 31(2). In response, the NIPB said they accepted that regulation 31(2) allowed them to agree to refer a decision back to a Selected Medical Practitioner (**SMP**) or IMR. They said their view was that the decisions by the Deputy Ombudsman had effectively set aside the 2009 and 2012 review decisions. The NIPB said it appeared that Mr X was of the view that the degree of his disablement had substantially altered. They again suggested that he request a review under regulation 35(1).

12. On 30 April 2015, the NIPB wrote to Mr X explaining they would shortly be consulting on a revised policy for the assessment of an individual's degree of disablement by medical practitioners. Amongst other things, they said all cases where a former officer's injury benefit had been reduced on review after reaching age 65 would be reconsidered. The NIPB said they did not intend to reassess cases where the benefit was increased or stayed the same; such as Mr X's. They said Mr X's benefit could be reviewed at any stage on request if he thought his condition had deteriorated.

Summary of Mr X's position

13. The key points in the submissions made by Mr X's solicitors are summarised below:
- Mr X has continued to receive injury benefit at the 2007 rate but the 2012 IMR report and certificate remain the last prepared in his case.
 - In *Haworth, R (on the application of) v Northumbria Police Authority* [2012] EWHC 1225 (Admin), the judge concluded there was no time limit on a request for a reconsideration of an injury benefit award. The judge said Police Authorities should give due cognisance to the merits of a request before deciding not to agree to it for reasons of delay or cost.
 - Mr X has obtained significant medical evidence which he wishes to put forward; namely, the letter from Dr D dated 23 June 2014.
 - It is their understanding that the Deputy Ombudsman did not delete, expunge or quash the SMP's or IMR's decisions. Rather, she determined that the 2009 and 2012 reviews had not been carried out in accordance with the regulations and should not be relied upon.
 - Mr X's application for reconsideration is a request for the most recent review to be properly constituted in accordance with the regulations.
 - The Deputy Ombudsman determined that Mr X's injury benefit should be paid at the 2007 rate until such time as it is properly reviewed. His request for a referral under regulation 31(2) would allow his case to be properly reviewed.
 - The 2007 review certificate specified that a further review should take place three years later. Therefore a further review should have taken place in 2010. If this had been the case, Mr X's benefit would likely have been increased and he would have benefited from this increase from 2010.
 - The final medical examination took place in 2012 and they consider regulation 31(2) provides an opportunity to seek a reconsideration of this decision.
 - If the NIPB allow a review under regulation 35, Mr X would only receive any increase in benefit from the date of the latest review.
 - Mr X has lost faith in the review procedure and, therefore, he is seeking a reconsideration rather than a review.

- In his report of 29 August 2012, Dr D stated Mr X's potential salary was zero and his overall loss of earning capacity was 100%. Whilst his deductions for musculoskeletal and constitutional psychological problems should be set aside, his calculation of potential salary and overall loss of earning capacity should be relied upon. Mr X would be agreeable to having Dr D appointed as IMR.
 - Mr X acknowledges that the NIPB have paid £300 so far for distress and inconvenience but he points out that he has been trying to resolve matters for six years.
 - If his case is to be reviewed by an IMR, Mr X would like a face-to-face consultation with the chosen doctor.
14. Mr X's solicitors have also submitted reports, dated 26 January and 29 July 2015, prepared by a consultant psychiatrist, Dr M.
15. Mr X would like to be reimbursed for the legal costs incurred in bringing his case.

Summary of NIPB's position

16. The NIPB's position is that the two previous determinations by the then Deputy Ombudsman quashed the 2009 and 2012 review decisions. They consider the last medical authority decision, for the purposes of regulation 31(2), to be the 2007 decision to award Mr X 57% or Band 3 incapacity.
17. The NIPB refer to the Deputy Ombudsman's direction to pay Mr X's benefit at the 2007 rate "until such time as it is properly reviewed". They view this as a reference to a review under regulation 35. They say they advised Mr X that he could request a review if he believed his condition had deteriorated but he did not accept this. They take the view that they have complied with the Deputy Ombudsman's directions.
18. The NIPB refer to another case determined by the then Deputy Ombudsman in which she stated that she was quashing two previous reviews of an injury benefit and directed the police authority to carry out a "current review" (*Jayes PO-279*). The NIPB note the Deputy Ombudsman did not use the word 'quash' when determining Mr X's case but did direct them to restore the pre-review level of benefit. They note she did not direct them to carry out a "current review" of Mr X's benefit.
19. The NIPB acknowledge that a review decision under regulation 35 would be implemented from the date of review. With regard to the points raised by Mr X's solicitors, they say:
- Dr D's review was procedurally flawed and his opinion should not, therefore, be relied upon.
 - On review, Mr X's benefit could be increased or reduced. If the review was undertaken under regulation 31(2) and his banding reduced below Band 3, this would be backdated to 29 August 2012. This would conflict with the Deputy

Ombudsman's direction to pay the Band 3 level. Since the Deputy Ombudsman's directions are enforceable, it is unclear how this could be resolved.

- Dr D expressed the view that Mr X's loss of earning capacity was 100%. However, his opinion was procedurally flawed in that he did not consider the impact of the injuries received on duty only. It should not be assumed that, on further assessment, a medical practitioner would find Mr X's loss of earning capacity to be 100%.
- Dr M's report, dated 26 January 2015, is not contemporaneous with the assessment by Dr D, on 2 June 2011. It provides an opinion on Mr X's psychological condition at that point in time; more than three years after the review.
- The judge in *Haworth* referred to reconsideration as a mechanism for correcting mistakes, either of fact or law. There are other mechanisms, such as the appeal tribunal under regulation 33 and/or an application to the Pensions Ombudsman. Mr X chose the Ombudsman route. The flaws in the 2012 review were corrected by the Deputy Ombudsman's direction to restore his benefit to Band 3 level.

20. Given the exceptionality of Mr X's case, if it was determined that a review was appropriate, they would ask the SMP to consider whether any substantial alteration in Mr X's loss of earning capacity could be dated back to his original request in May 2014. If Mr X's case is to be reviewed as at August 2009, their view would be that any medical evidence which is not contemporaneous (or post-dates August 2009 but relates back to Mr X's condition at that time) should not form part of the submission to the IMR. They are content that there should be a face-to-face assessment by the IMR.
21. With regard to any payment for distress and inconvenience, the NIPB point out they have already paid £300 in accordance with the Deputy Ombudsman's directions in PO-2769.

Conclusions

22. Mr X requested the NIPB agree to refer his case back to Dr D under Regulation 31(2). Regulation 31(2) applies when a medical authority (SMP or IMR) has given a final decision.
23. The sequence of events in Mr X's case was:
- August 2009 SMP review decision
 - August 2011 PIMR appeal decision
 - June 2012 referral back to PIMR under Regulation 31(2)

- August 2012 PIMR review decision

24. The NIPB declined to refer Mr X's case back to Dr D on the grounds that the Deputy Ombudsman had set aside his decision (and the earlier 2009 decision). In other words, there was no decision which could be reconsidered under Regulation 31(2).

25. Mr X's solicitors have referred to *Haworth* and to the judge's finding that there was no time limit for requesting a referral under Regulation 32(2) (the equivalent regulation for England and Wales). However, the NIPB did not decline to refer Mr X's case on the grounds of time. In that respect, the *Haworth* case does not help Mr X. What is more useful to Mr X's case is the discussion as to the purpose of the injury benefit scheme and Regulation 32(2).

26. In *Haworth*, the claimant sought a referral for reconsideration of a decision taken in 2006. Her request was made in 2010. The police authority declined to refer the decision and argued that there was a need for finality; not least because there would be a potential cost to it if cases were to be reopened many years after a 'final' decision. One of the points raised by the claimant was the effect of the refusal to refer her case under Regulation 32(2). The only other option available to her was a review under Regulation 37 (the equivalent of Regulation 35 above). However, the courts had determined that such a review could only consider whether there had been a substantial change in the degree of disablement since the last review. In other words, a review under Regulation 37 could not correct mistakes made in 2006.

27. The judge concluded,

“... 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 a review ..., has been determined in accordance with the regulations and 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.

In other words I am persuaded that in the light of the statutory scheme as a whole, there is no reason not to construe regulation 32(2) as in part a mechanism ... to correct mistakes either as to fact or as to law which have or may have resulted in an officer being paid less than his full entitlement under the regulations, *which cannot otherwise be put right*, which is this case. As I have already explained, the review process under regulation 37 cannot assist the claimant to correct the mistakes of law she has identified in the approach made by the PMAB in 2006 ...”

28. The judge went on to say this should have been the starting point of any decision making process by the police authority in deciding whether to give consent to refer

the case. He said the police authority's starting point should have been to assess the strengths of the merits of the case sought to be pursued and the long term effect on the former officer if she were denied the opportunity to have the mistakes corrected. He would agree that, in the absence of a good reason to the contrary, consent should be given where the former officer could demonstrate a reasonable case, capable of being resolved by reconsideration, that the pension he was being paid was incorrect by reason of a decision made not in accordance with the regulations.

29. In Mr X's case, the NIPB started from the point that there was no final decision which was capable of being referred back to Dr D under Regulation 31(2). They came to this conclusion on the basis that the Deputy Ombudsman had determined that the 2009/11 review decision and Dr D's reconsideration in 2012 had not been reached in accordance with the Regulation. The NIPB took the view that the effect of the Deputy Ombudsman's determinations was to set aside the decisions so that they were not capable of being referred under Regulation 31(2).
30. The Deputy Ombudsman found that the review and reconsideration had not been carried out in accordance with the Regulations and, consequently, it was maladministration to reduce Mr X's benefit in reliance on them. She did not determine that the 2009 or 2012 decisions should be 'set aside' nor could her determination, in and of itself, be said to have set aside the decisions. The Deputy Ombudsman found that the NIPB should have ensured the SMP (in 2009) and Dr D (in 2012) applied the correct tests and referred the matter back to them if they did not, rather than relying on the decision(s) to reduce Mr X's benefit.
31. The statutory purpose of the regulations and the discretion provided therein is to ensure Mr X is receiving the injury benefit to which he is entitled. As it stands, Mr X may be being paid the wrong amount of benefit. Because there has been no properly conducted review, no-one knows whether or not this is the case. A review under regulation 35(1) would not address this situation because it could not address mistakes made previously. However, a referral under regulation 31(2) could address any such mistakes. The NIPB have said they will direct the IMR to consider the situation in May 2014 (the date of Mr X's request). However, this would not help to determine whether or not Mr X has been in receipt of the correct benefit since the 2009 review; that is the first review which was found to be not properly conducted in accordance with the regulations.
32. The NIPB have expressed concern that, should such a review determine that Mr X's benefit should have been reduced at an earlier date, there would be a conflict with the previous directions from the Deputy Ombudsman. The Deputy Ombudsman's determination(s) focussed on the actions of the NIPB in reducing Mr X's benefit in reliance on an incorrectly conducted review(s). In directing that his benefit be returned to the pre-review level, the Deputy Ombudsman did not preclude further review of Mr X's benefit; she simply found that it had been maladministration to reduce the benefit until such time as a properly conducted review had been undertaken.

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33. In view of the fact that this is the third time Mr X has needed to apply to the Pensions Ombudsman Service concerning his injury benefit, I am taking the slightly unusual step of directing the NIPB to exercise their discretion to refer his case to an IMR under regulation 31(2).
34. The NIPB have asked for clarification as to what evidence can be considered as part of the review. They take the view that this should be confined to contemporaneous evidence only. This is unduly restrictive. Had the original 2009 review been undertaken in a proper manner, it is possible that either Mr X, or the IMR, might have sought additional evidence. It does not seem right that Mr X (or the IMR) should be denied that opportunity simply because the review is being conducted later as a consequence of maladministration. It is, however, the case that any evidence which is submitted (by either party) must relate to Mr X's condition at that time. In other words, any doctor who is asked to provide a report must be asked to say what his opinion would have been had he been asked in August 2009. There can be no recourse to hindsight.
35. I understand that the appeal process (of which a review would be part) is administered by the Department of Justice (**DoJ**). The NIPB would normally provide a submission to the DoJ and they arrange for the case to be reviewed by an IMR. However, under the regulations, it is the NIPB which is responsible for the review. It is, therefore, the responsibility of the NIPB to ensure that the review of Mr X's injury benefit is carried out in accordance with my directions.
36. Mr X has pointed out that he is now in the sixth year of trying to resolve matters with the NIPB. However, this investigation must concern itself solely with events since the then Deputy Ombudsman's last determination. I do not find that there was undue delay on the part of the NIPB in dealing with Mr X's request for a referral under regulation 31(2) on this occasion.
37. Mr X has also asked that his legal costs be considered. It is, of course, open to Mr X to engage the services of a solicitor. However, it is not necessary for the purposes of applying to the Pensions Ombudsman Service; as Mr X is aware, having conducted his previous two applications himself. In view of the fact that both the Pensions Advisory Service and the Pensions Ombudsman Service are free, I would only consider awarding legal costs in exceptional circumstances. Whilst I acknowledge that Mr X's health is not good, I do not believe there has been a deterioration in his health since his previous applications such that engaging solicitors could be seen as a necessity. Nor was the subject matter of this current application any more complex than the previous two. I do not find the circumstances of Mr X's case warrant my awarding his legal costs.

Directions

38. Within 28 days of the date of my final determination, the NIPB will arrange for Mr X's case to be referred to an IMR who has not previously been involved in the case. Mr X

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is to be given the opportunity to make submissions to the IMR within the same 28 days.

39. The NIPB are to ask the IMR to review Mr X's injury benefit as at August 2009. Any adjustments to his benefit are to date from then and, if applicable, arrears paid with simple interest at the rate quoted for the time being by the reference banks.

Anthony Arter
Pensions Ombudsman

23 September 2015