Injury Award Reviews

1. General information required from Retired Members

• Full name

• Date of Birth

• Full address including postcode

• Contact telephone numbers

• Email details

• Date of joining police

• Date of retirement

• Rank and service number on retirement

• Level of Injury award on retirement and relevant documentation

• Details of any subsequent reviews (if any)

• Date of last review and level of injury award after last review

• Full details of General Practitioner

• Details of any DWP awards and assessments (including details of any disability related awards)

• Details of any specialists that have treated or are still treating you for the condition subject of your injury award.

• History of the qualifying condition subject of the award since retirement or since the last review; including any deterioration of the condition and how it has affected your capability to work.

2. Guidance on the Review Process

The Chief Constable, as the Police Pension Authority, is entitled to commence a review of a former police officer's injury award at a ‘suitable interval’ under Regulation 37 of the Police [Injury Benefit] Regulations 2006, and former officers should co-operate fully in any such reviews.

- The Chief Constable is obliged to appoint an SMP to carry out the review
- The first question for the SMP is whether there has been a substantial alteration in the former officer's degree of disablement since retirement if this is the first review or since the last review.
- The injury pension can only be revised if the SMP determines that there has been a ‘substantial alteration’ since the last review or retirement if the first review.
- In gathering such information to conduct a review, the Information Commissioners Office (ICO) has stated in November 2017 (ICO and Northumbria Police), that a Force **cannot require excessive amounts of personal data from former officers as part of their review process** e.g. full access to all medical records from birth (including specialist reports), Financial details and Information concerning any legal advice sought by the officer.
- A blanket request for full access to historical records dating from birth appears to be disproportionate and excessive given the purpose of the

SMPs review. The requirement for all historical data held about former officers as part of IODA reviews appears to be excessive and in breach of the Data Protection Act.

- The SMP can reach the decision that there has been a substantial alteration in the former officer's degree of disablement over the review period for a variety of reasons including:
    - There has been a change to the medical effects of the former officer's duty injury which results in a change in the type of jobs that the former officer is reasonably capable of undertaking or the number of hours that the former officer is reasonably capable of working in such jobs; and/or
    - There has been a change in the skills of the former officer which results in a change in the type of jobs that the former officer is reasonably capable of undertaking or the number of hours that the former officer is reasonably capable of working in such jobs; and/or
    - The former officer now suffers from an additional non-duty related injury which has an independent effect on his or her earning capacity; and/or
    - There are one or more jobs now available that the former officer is reasonably capable of undertaking which have only become available during the review period.
- The SMP is obliged to produce a report with reasons explaining his or her decision both as to whether there has been an alteration in the former officer's degree of disablement over the review period and whether any such alteration is substantial.

- The SMP is entitled to refer the former officer for investigations or assessments from another doctor to assist the SMP to make a decision. If this happens, the former officer is entitled to see copies of all notes or reports made by any doctor providing an opinion to the SMP.
- Regulation 33 provides that the Chief Constable may make a decision about a review if a former officer fails to attend an interview with the SMP or refuses to permit the SMP to conduct an examination if called upon to so. The obligation on the former officer is attend the interview. Whilst there is no specific obligation on a former officer to answer questions posed by an SMP, it is good practice to do so and adverse inferences could legitimately be made by the SMP if the former officer refuses to answer appropriate questions

3. Degree of disablement

The case of TURNER explained that:

The SMP can consider current jobs that are suitable for the pensioner and ***were not available*** *when the original decision was made or the last review was conducted.*

The SMP is not entitled to take into account jobs that ***were previously available to the pensioner (even if not considered at the last review)*** *or which the pensioner had previously carried out since these jobs cannot be evidence of a change in the pensioner's degree of disablement.*

The PIBR 2006 explain how a person's degree of disablement shall be determined at Regulation 7(5)

(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 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:

This assessment was an integral part of *ANTON* although the general issue was about apportionment the Judge at Para 42 indicated how 'earning capacity' was to be assessed:

The task, in my judgment, in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not a labour market assessment, or an assessment of whether somebody would actually pay him to do what he is capable of doing, whether or not in competition with other workers.

The Court of Appeal decision in **LAWS** at para 27 includes:

Here I think the judge was in error. She has approached Regulation 7(5) as if it meant that the pensioner's earning capacity is fixed, unaffected by anything save the duty injury. That would be highly artificial, and is not what the Regulation contemplates. Its terms allow for the obvious ***possibility that the pensioner's earning capacity may vary from time to time by force of external factors*** *(and of course one pensioner's earning capacity will differ from another's). Objectively, the extent to which a pensioner remains disabled from work by reason of a duty injury must be capable of being affected by the acquisition of new skills.*

Particular Evidence required on reaching compulsory retirement age for the rank and/or state retirement age, should Forces seek to use ASHE [NAE] figures by default.

The case of SLATER reinforced the fact that:

Reviews at a Compulsory Retirement Age [CRA] must relate to the individual circumstances of the officer. This means that the blanket National Average Earnings [ASHE] figures cannot be automatically used to cut pensions, there must be an individual assessment.

• Any evidence that the members 'peer group' on a rank or skill basis where in employment earn above or well above the national average earnings (ASHE figure). This would seek to show that the individual with their relevant skills can earn higher wages as a result of their police gained or other qualifications. Certain skills may attract higher wages e.g. Firearms instructors/experts, Intelligence experts, RTC reconstruction, Trained negotiators etc.

• Any other qualifications e.g. degrees, managerial or personnel qualifications, financial qualifications etc. which would result in the member potentially earning more in employment than the national average earnings.

- The individual would still need to show that their inability to generate any or only a reduced income is as a result of their qualifying injury

(injury on duty).

The 2017 case of FISHER reinforced the position that when determining the *degree of disablement the* comparative police salary must be the one used as a starting point to determine the uninjured earning capacity for those under Compulsory Retirement Age.

The decision included:

42. *The task for the Board is to assess what the pensioner would have been capable of earning if he had not suffered the injury in question. Since all the claimants appearing before the Board previously worked as police officers, and since the precondition for a claim to an injury award is the fact that the Claimant suffered an injury on duty,* ***the previous police earnings must, it seems to me, at least feature in the Board's analysis.***

43. It may well be that there is evidence to suggest, in a particular case, that police earnings do not fairly represent the pensioner's current earning capacity if he had not suffered the injury on duty under consideration. The pensioner may have suffered other injuries, or may have acquired other skills, or lost skills he previously displayed, so that his earning capacity, had he not suffered the duty injury, would not fairly be represented by earnings in the police. But absent circumstances such as that, what the pensioner previously earned in the police must at least be a relevant consideration in determining his uninjured earning capacity.

44. Furthermore, if the Board is going to disregard the police earnings in reaching its assessment, then in my judgment, it must explain why it is doing so. Given the nature of the cases that come before it, it is not open to the Board simply

to disregard previous police earnings without explanation. It appears to me that that is what they have done on the facts of the present case. On these grounds alone the approach of the Board was flawed and this decision cannot stand.

The full decision can be seen at: http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2017/455.html&query=(FISHER)

45. In EVANS and another v Chief Constable of the South Wales Police (2018), the judge had not erred in finding that 'the provisions' governing scales of additional benefits in para 7(1) and (2) of Sch 3 to the Police (Injury Benefit) Regulations 2006, 2006/932, had referred to s 150 of the Social Security Administration Act 1992, not the annual uprating orders under that provision. However, the Court of Appeal, Civil Division, allowed the appeal to the extent that deductible levels of additional benefits from the 2010/11 tax year onwards needed to be recalculated as if the increases in that tax year had never been implemented and the base levels for subsequent increases had been correspondingly lower.

46. In McLOUGHLIN v The Chief Constable of West Yorkshire (April 2019), the judge tackled the limitation considerations, finding that the claim for an increased injury pension was not statute barred in that time only began to run when the original medical opinion of 1984 was substituted for a medical opinion produced some 34 years later.

Significantly, the fresh medical opinion only arose due to the ‘reconsideration’ provisions of the police injury benefit Regulations which were utilised when

the Appellant later alleged fraud in the preparation of the first medical report in 1984. This resulted in a medical report being produced in 2018 which indicated that McLoughlin was indeed suffering an injury much greater than the original medical report first indicated. It remains to be seen whether the decision will be subject to any appeal.

The full decision can be seen at-

http://www.bailii.org/ew/cases/Misc/2019/9.pdf

47 In Boskovic v Chief Constable of Staffordshire Police (April 2019)

- Regulation 32(2) of the 2006 Regulations should be construed as a consensual and facilitative provision allowing reconsideration of questions affecting pension entitlement by
- In deciding whether or not to agree to a request for a reference under regulation 32(2), the police pension authority must act reasonably, taking into account only relevant
- The weight to be attached to the relevant considerations is a matter for the decision
- The merits of the underlying claim are one factor, but in assessing the merits the authority is entitled to take into account the fact that the evidence is not clear-cut.
- In assessing the questions under regulation 30(2)(c) and (d), the SMP is bound by the answers of an earlier SMP who carried out an assessment of the questions under regulation H1(2)(a) and (b) of the 1987 Regulations, but not by any diagnosis underpinning those

- A police authority is entitled to take into account any uncertainty about the diagnosis when deciding whether to agree to a reference under regulation 32(2) of the 2006
- Amongst the other factors which a police authority is entitled to take into account when deciding whether or not to agree to a reference under regulation 32(2) is any delay in pursuing the claim, together with the costs of any

The full decision can be seen at-

https://www.bailii.org/ew/cases/EWCA/Civ/2019/676.html

48. In R (on the application of Chief Constable of South Yorkshire Police) v Kelly (February 2020) , the Crown Court had correctly upheld the interested party's appeal against the refusal of the police pension authority to admit a claim to receive a larger award than that granted, namely, an amount that represented an injury pension backdated to the date on which he was originally required to retire. However, the Administrative Court held that it had had no power to include interest in its larger award.

The full decision can be found using the following link

https://www.bailii.org/ew/cases/EWHC/Admin/2020/210.html

Court of Appeal Judgment re. Kelly (November 2021) can be seen on Bailii at;

https://www.bailii.org/ew/cases/EWCA/Civ/2021/1699.html

Facts

This case was about a police officer who suffered an injury on duty during his service with South Yorkshire Police Force resulting in PTSD. In 2005 he was certified as being permanently disabled and ill health retired. The Police Pension Authority (PPA) failed to refer him to a Selected Medical Practitioner (SMP) for a decision as to whether his permanent disablement had been caused/substantially contributed to by injuries on duty. Mr Kelly was too poorly to make the application himself at the time of retirement. In 2016 he made the application and in 2017 the SMP determined that he was entitled to a band 3 injury pension. The PPA asserted that this could only be paid from the date of his application. We argued that it was payable from the date of his retirement.

Court of Appeal

The Judgment is in favour of Mr Kelly on all three points argued in front of the court. Specifically;

Jurisdiction – the court confirmed that the Crown Court is the relevant court in which to raise any issues about the date upon which an injury award should be paid from;

Date an injury award is paid from – the court have confirmed that;

a. It is not necessary for an officer to make an application for an injury award in order for them to become entitled to it (this would place a burden on an officer to acquire a right to an injury pension);

b. For officers who have been required to retire because of disablement, the answer as to when their injury award is payable from would appear to be straightforward, ie. from the date of retirement;

c. Regulation 11 is clear and unambiguous and sets out an officer's entitlement to an award (when certain conditions are met) confirming that an injury award is not payable prior to retirement (eg. NOT that it is not payable for a period before the determination of disablement);

d. The true purpose of Reg 43(1) is to provide, consistently with reg 11(1), that once entitlement is established, the pension will prima facie be payable for life from the date of retirement, even if that involves paying substantial arrears.

e. The exception to the basic provision (set out at (d) above), where disability arises after retirement is provided for in regulations 11(2) (where the person ceased to serve before becoming disabled no payment shall be made on account of the pension in respect of any period before he became disabled) and 7(7) (where a person has retired before becoming disabled and the date upon which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the police authority).

It was open to the Crown Court to award interest.

49. In (R (Peter Goodland and others) v Chief Constable of Staffordshire Police)

> (September 2020) there is a continuing statutory duty on Police Pensions Authority to review level of injury pension awarded to retired police officers.
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> The case concerns the workings of regulations 33 and 37 of the Police (Injury Benefit) Regulations 2006 (the 2006 Regulations). The first claimant argued he had a legitimate expectation that his degree of disablement, by which his police injury pension was calculated, would not be subject to any further reviews following an express promise to that effect made by the Police Pensions Authority (PPA). The remaining claimants, during regulation 37 reviews, refused to complete questionnaires sent by the PPA and refused to provide access to their medical records, following which the PPA sought to determine the reviews under regulation 33. The claimants argued regulation 33 did not apply on the facts, and that the process followed breached their European Convention on Human Rights (ECHR) and Fundamental Freedoms under Article 6 rights. The claims were dismissed. The court found the PPA's promise of no further reviews was itself unlawful and did not found a legitimate expectation. The refusal to disclose medical records was held to trigger the regulation 33 power, and it was found on the facts that the process followed was fair and Article 6 of the ECHR compliant.

The full judgment can be seen here-

https://www.bailii.org/ew/cases/EWHC/Admin/2020/2477.html

ANY AUTOMATIC REDUCTION OF AN INJURY AWARD AT ANY AGE WITHOUT A PROPER REVIEW THAT DOES NOT INCLUDE A MEDICAL EXAMINATION, WORK CAPABILITY TEST AND EARNING CAPACITY ASSESSMENT IS CONTRARY TO THE REGULATIONS AND LEGAL PRECEDENT.