

Basis for Appeal

disagreed that his degree of disability should be reduced from 60% to 0% that is from Band 3 to Band 1.

Occupational History/ Background to Case

joined the Northumbria Police in 1954. Prior to this he had served in the RAF for three years as part of his national service. During this time, he trained as a Radar Mechanic. He served in the Northumbria Police for four years before volunteering to work in Cyprus as a policeman. However, on 12 October 1958, was shot. Due to his injuries, he was medically retired from Northumbria Police and the Medical Board at that time estimated his Degree of disability to be 60%.

Following his retirement he ran a corner shop in Newcastle but sold this after one year as it was not economically viable. Following this he undertook Auditing work in a retail company and then joined a TV company as an Internal Auditor. He undertook stock checks, administration and computer work. He also undertook work as a Stock Controller with BOC in Rotherham.

In 1968 he returned to Newcastle and set up his own private investigation business with another colleague. He undertook this work for 12 years until 1980. This firm ran into financial difficulties and he sold this business in 1980. He then moved to Ibiza, where he undertook some irregular work before working for a Spanish company until he was 67 years old. For the last 10 years he has been an Administrator for a complex of 10 apartments, which involves payments of bills and organising repair work.

was ill-health retired from the Northumbria Police on 30 November 1959. The degree of disablement was set at 60%. A review of degree of disablement took place on 22 November 1960 and again his degree of disablement had not altered and it remained at 60%. A further review took place on 23 November 1962 and his degree of disablement remained at 60%. Further reviews also took place on 23 November 1965 and on 6 December 1971. Again at these reviews his condition had not altered and his degree of disablement continued to be 60%. Further Reviews also took place in 1973 and 1975 and on these occasions his degree of disablement had not altered and remained at 60%.

On 5 March 2009 a letter was sent from Northumbria Police to indicating that it was usual for injury awards to be reduced to the lowest band once an individual reached the state retirement age of 65. Therefore his case was referred to Dr Broome, who is the Selected Medical Practitioner for the Northumbria Police. Dr Broome stated in a letter that he had been asked to consider the non-medical question of degree of disablement and was therefore precluded by the Police Pension Regulations from reviewing the questions of permanent disability medical cause and the relationship of these to an injury on duty. He also advised that as the pensioner had reached the state retirement age, he no longer had an earnings capacity for the purposes of the Police Injury Benefit Regulations. Northumbria Police had also deemed that there was no cogent reason why the pensioner should not be considered to have a 0% loss of earnings capacity as a consequence of their injury. Therefore, Dr Broome recommended that should be placed in the 0 - 25% degree of disablement.

His injury award is currently in Band 3 and as he has appealed against the decision to move him into Band 1, he is still receiving this injury award. However, if he is not successful in his appeal he will have to repay the additional money received back to April 2009.

Submission by the Appellant and Representatives

The key points made by ~~XXXX~~ were:

He had not been informed about the SMP's impending assessment and had not had the opportunity to put forward his cogent reasons. Since he had been informed of the reassessment, he had put forward two cogent reasons why this reassessment down to Band 1 should not take place. His first cogent reason was that if he did have a decrease in his income that this would cause him severe hardship with his finances. He stated that if he were to lose the appeal, he did not feel that he would be able to remain in Spain purely receiving his state pension and he might have to return to the UK to receive further UK benefits to which he believed that he would be entitled.

His second cogent reason was that he believed that he had not retired and that he was still working and provided evidence of his employment and therefore as he was capable of employment he should still be entitled to his injury award.

He does not own his apartment and now lives with his partner in her apartment. He relies on his current income to pay his bills and living expenses and feels that any reduction in his income would lead to hardship as he would not be able to manage on this. In addition to this, he has no other savings. He also felt that the rule about retiring at 65 and drawing a State Pension was too general and that each case should be taken on merit as in his case he was still working and was clearly capable of working, albeit with a modest salary.

~~XXXX~~ stated that no effort had been made to refute the cogent reasons that he had put forward as he believed they were valid. ~~XXXX~~ also quoted from the review of Police Injury Benefits Consultation paper 2008 that a forward had been written by Mr Tony McNulty, the Police Minister. He stated that this paper made it clear that any changes to the injury benefit system which emerged from the consultation will not affect officers and the families who have already ceased to serve at the time of implementation. Hence that any review that occurred at age 65 should not be applied retrospectively to former officers who have retired. He also quoted from the Police Injury Benefits summary and analysis to consultation which stated that, 'former officers and their dependants will remain subject to the provisions applicable at the time that they ceased active services and not to future changes in Home Office Guidance'.

Comments made by Police Authority on the submission by the Appellant

No comments were made.

Review and Clarification of Medical Issues

The Board was able to question the Appellant and clarify the following:

~~XXXX~~ had studied the NARPO website but had not contacted NARPO for advice about his appeal and was not represented at the board by a representative. Although there had been some improvements in his condition in 1959, there had been no substantial change since that date and all of his medical reviews since then had kept his degree of disablement at 60%.

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[REDACTED] was also asked about his social situation and he stated that he was currently living with a partner in her apartment; she was aged 66 and had retired. He currently receives £1040 per month from his pension injury award and annuity and the income he derives from his work. In addition to this, he receives £170 per month from a Spanish pension. He had not provided details about his outgoings so was questioned about this and he stated that he currently spends €800 per month on food, bills and other living expenses. This money is given to his partner. He also spends €300 per month himself on petrol and other expenditure, he confirms that he now does not own a property and lives with a partner in her property. He currently does not have any expenditure on health care or social care. Mr [REDACTED] also stated that he had been adversely affected by the exchange rate fluctuations and that his income is received in pounds so that the relative cost of living in Ibiza had increased to such an extent that he was only just able to live on his current income. He again stated that any reduction in his income would cause him hardship and he may have to return to the UK to receive the appropriate social benefits.

Submission by the Police Authority Representatives

An assessment had been undertaken by Dr Broome on 20 February 2009 and [REDACTED] had been assessed as within the slight banding, Band 1 for the permanent disabling condition of gunshot injury to left arm with partial sensory loss affecting left hand. The Home Office circular 46/2004 had given guidance in relation to pensioners aged over 65 when being re-assessed. Once a former officer receiving an injury pension reaches the age of 65, they would have reached their state pension age irrespective of whether they are male or female. The Force then has the discretion, in the absence of a cogent reason otherwise, to advise the SMP to place the former officer in the lowest Band of degree of disablement. At such a point, the former officer would normally no longer be expected to be earning a salary in the employment market.

The index injury occurred on 12 October 1958, when [REDACTED] was serving as a Sergeant (Cyprus Rank) in Cyprus. He sustained permanent disabling condition of gunshot injury to the left arm with partial sensory loss affecting the left hand. The SMP had considered cogency, penury and destitution when he made his assessment in February 2009. Though there is an established process for dealing with pensioners over the age of 65, the injury award is to provide for loss of earnings and is not designed to make up earnings after the age of 65. It was thought necessary for the SMP to examine the individual in this case as the issues primarily related to cogency.

The Police Authority believed that having received the correspondence from the Appellant, it contained no cogent arguments. The Police Authority stated that his earnings loss had always been at a level within the third banding prior to the latest assessment. This reflected that he has always been able to earn an amount to supplement his police ill health pension. At the time of the appeal hearing, his ill health pension was £786 per annum and his Injury award payment £3651 per annum. The Police Authority stated that although [REDACTED] had said that he disagreed with the determination of the SMP with respect to his earnings capacity and that he had disagreed with the process, this did not include any cogent arguments.

The Police Authority did not accept he was suffering from penury and that he was still working to supplement his income. The Police Authority also stated that he had, following his injury, been able to work in a variety of occupations and during this time should have made provision for himself in the form of a pension that would have provided for him in old age. The Police Authority also stated that the examining doctor, Dr Blaiklock had, at the time of [REDACTED] discharge, stated that his degree of disability will likely to become less in time

and that [redacted] could undertake clerical work and was able to supplement his injury award by undertaking this type of work.

The Police Authority also stated that with injury awards there is normally a comparator that the loss of earnings can be compared against. However, once the individual reaches the age of 65 there is no comparator as the presumption is that the individual will not be working, therefore, there is no loss of earnings compared with a normal healthy individual as it is presumed that the normal healthy individual would be retired.

Comments made by Appellant on the submission of the Police Authority

[redacted] stated that he had undergone medical examinations up until 1987 and there had been no improvement in his case. He believed that the SMP had not been given sufficient information about his case and that the Police Authority had made no attempt to find out whether he had any cogent reasons for his award not to be reduced or whether he was still in employment. He did believe that the cogent reason whereby any reduction in his income would result in penury would apply to him. [redacted] stated that although he had worked full time in similar occupations, he had been unable to accrue a similar pension to that of which he would have received had he served for his intended time of 30 years until he was eligible for his pension.

The Police Authority explained that there were situations where an examination by the Selected Medical Practitioner would be necessary, however, in his case as he was over the age of 65 the main issue in determining the degree of disability is the cogency of any argument why the award should not be reduced. Therefore the decision is largely devoid of any medical input.

Review and Clarification of Medical Issues

There was no further review nor clarification required.

Final Comments

Appellant

The Appellant stated that he believed he had presented two cogent reasons why his injury award should not be reduced and that if this award was reduced he genuinely believed he would suffer from penury and he would be at a significant disadvantage because of this significant reduction in his income.

This reduction in income may result in him having to leave Ibiza and return to the UK to receive UK financial benefits. He believed there had been no significant change in his degree of disablement since 1959. He also stated that he did not have any savings and did not own a property.

Although he had worked since he left the police force in 1959, he had not been able to accrue a similar pension to that of what he would have received had he been in the police service for 30 years.

He had sold some of his businesses but when he moved to Spain in 1980 had had a period of unemployment and had had a resultant reduction in his income when he had taken further employment.

Police Authority

The Police Authority stated that although there had been no significant change in his injuries since 1959, he had been able to work full time and had run a number of successful businesses and had plenty of time to pay into another pension to ensure that he had provision in his old age after his normal retirement date. The Appellant also stated that his injury had not grossly affected his chosen line of employment and had not grossly affected his earning capacity once he had left the police service. Although he will suffer some hardship as a result of his reduction in his income, this will not lead to penury. He also believed that he had not suffered a financial loss as a result of this injury up until his normal retirement age of 65. He stated it was not for the public purse to pick up his shortfall as he has made inadequate provision for his old age.

The Police Authority confirmed that had ~~he~~ completed 30 years service in the police he would have been entitled to a maximum pension at this point in time of £7683 per annum. The Police Authority also confirmed that his Band 1 injury award would be £960.35 per annum from April 2009.

Results of Clinical Assessment Performed By Consultant SpecialistEXAMINATION:

- A pleasant, co-operative, articulate 77 year old who walked, seated himself and arose satisfactorily.

Upper limb neurological signs:

The biceps and triceps reflexes were satisfactory but the supinator reflexes both required reinforcement. Motor power in the upper limbs showed some wasting of the left upper limb both in the arm and the forearm as well as in the hand. In particular there was wasting in the thenar muscles, the lumbical muscles and seemingly the first dorsal inter-osseous muscle. Light touch sensation was reduced in the median nerve distribution particularly in the index and middle fingers as well as on the radial side of the ring finger. The thumbs seemed satisfactory to light touch examination. Tinnel's test was negative for the ulnar nerve but positive for the median nerve where there seemed to be a soft tissue swelling, probably a neuroma, on the volar aspect of the wrist.

Hands:

Both showed good hydration and circulation. The skin of the volar aspect of the left hand and fingers was soft indicating lack of use. It was noted on turning pages with his left hand he generally placed the pages between the ring and little fingers, although on occasion, between the index and middle finger. The thumb was adducted into the palm and was not spontaneously mobile at its base. There was no activity of opponens pollicis nor abductor pollicis brevis.

Wrists:

Dorsi-flexion and palmar flexion were satisfactory. Movement of the distal radio-ulnar joint was satisfactory, there being no crepitus or swelling on movement of either the wrist or the distal radio-ulnar joint.

Forearms:

Pronation was satisfactory and equal. Supination was satisfactory on the right but was diminished by about 10-15° on the left. There were three well healed surgical scars on the volar aspect of the left distal forearm, some of which extended into the hand.

Elbow joints:

The range of movement was 0-140° on the right but 50-130° on the left.

IMPRESSION:

Longstanding neurological deficit due to gunshot wound left arm. Fixed flexion deformity of left elbow. No evidence of significant change in the year since last assessed.

CASE DISCUSSION**Key Medical Considerations**

The key issue for the Board in this case is to determine the current degree of disablement.

Relevant Case Law

The Regulations define degree of disablement as follows:

7-(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/her earning capacity has been affected as a result of an injury received without his/her own default in the execution of his/her duty as a member of a Police Force.

Regulation 37 – Police Pension (Injury Benefits) Regulations 2006:

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.

Home Office Guidance – Degree of disablement after age 65 (20):

Once a former Officer reaches the age of 65, he/she will have reached State Pension Age irrespective of gender. In the absence of a cogent reason otherwise, the SMP may place the former Officer in the lowest Band of disablement. At such a point the former Officer would normally no longer be expected to be in employment.

Turner 2009:

The Court held that in order for the injury pension to be revised there must be a change. The change can be in the medical condition; or if new jobs have become available, which the Appellant, allowing for the qualifying injury, would be able to undertake.

Crocker 2003:

The Administrative Court commented that the task in assessing earning capacity is to assess what that person is capable of doing and thus capable of earning. It is not a labour market assessment of whether somebody would actually pay that person to do what he/she is capable of doing, whether or not in competition with other workers.

Detailed Case Discussion

The Board have carefully considered all of the documents provided in this case and all of the evidence provided both in written submissions and verbally on the day of the hearing.

The Board had confirmed that the issue, which it had to determine, was the question of the degree of disablement.

The Board were able to establish, by taking a detailed history and examining the Appellant that he had likely suffered a gunshot injury to his left arm with partial sensory loss affecting his left hand as a result of his qualifying injury.

The Board are not entitled to revisit the disablement, its permanence or whether it was the result of an injury on duty.

The Board were able to establish that the Appellant's qualifying disablement had not only remained unchanged since his last review in 1987 but that it had remained static following his surgery in 1959.

The Board had established that BE was currently working as an administrator for a complex of flats and is paid £260 per month for this job.

However it has been established that such a role existed at the time of his last review in 1987 and therefore was not a new job. The Police Authority had supplied no new job comparator roles. It is irrelevant, as determined in the case of *Crocker*, as to whether an employer would pay him to do the work, being that he is now age 77, whether or not in competition with other workers. Arguably therefore as determined in the case of *Turner*, there has been no change, since the last review.

There has been no change in his clinical functional capability and no new jobs have been put forward. In the absence of such a change, there can be no substantial change in the degree of disablement. In the absence of a substantial change in the degree of disablement and in accordance with the Police (Injury Benefit) Regulations 2006 the injury pension cannot be revised.

The Board fully understands the Police Authority's position that they have followed Home Office Guidance as to how to determine the degree of disablement once a former Officer has reached State Retirement Age. It understands that there is an expectation that the former Officer is unlikely to be in employment at that time.

Whilst the Pensions Ombudsman's determination in the case of *Ayre* decided that while an individual over the age of 65 retains earning capacity, it is not binding on the Board, however it is nevertheless indicative. The Police Authority relies on the argument of cogency as detailed in the Home Office Guidance.

The Board, in recognising the Police Authority's case in respect of the Home Office Guidance and the Guidance to Police Medical Appeal Boards, nevertheless consider that they have no alternative but to observe the Police Benefit Regulations where there is no mention of such an argument as cogency, or indeed no specific mention of degree of disablement after age 65. There is no mention in the Regulations that a review of degree of disablement at any time requires an alternative methodology.

The determination of degree of disablement on review, in terms of the Regulations, requires that there has been a substantial change in the degree of disablement, before the benefit can be revised. This takes cognisance of the judgment in the case of *Turner*.

The Board is left with the inescapable fact that, despite Home Office Guidance on the matter, it has no alternative but to determine that ~~Mr. [redacted]~~ should remain in Band 3 as there has not been a substantial change in the degree of his disablement since the last review in 1987.

There is no doubt, that the Board would have to agree that, if they were to determine the case on the issue of cogency, as outlined in the Home Office Guidance, in view of the fact that the Appellant has produced no cogent argument, the outcome of this appeal would be different.

In reaching its decision, the Board are aware of the ramifications of its decision but it will be for a higher authority to determine if they have erred in law after a proper consideration of the Regulations and the existing case law.

Determination of the Board

The Board upholds the appeal of ~~Mr. [redacted]~~ on the basis that there has been no substantial change to the degree of disablement since his last review in 1987. The degree of disablement therefore remains in Band 3.

Signatures of Each Board Member



Dr Jonathan Bastock



Dr Ian Lambert



Mr Charles Kolb

26 January 2010