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CO/853/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 9 February 2009

B e f o r e:

MR JUSTICE SILBER

Between:
THE QUEEN ON THE APPLICATION OF POLLARD

Claimant

v

POLICE MEDICAL APPEAL BOARD

Defendant

and

WEST YORKSHIRE POLICE AUTHORITY

Interested Party

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(Official Shorthand Writers to the Court)

Mr M Westgate (instructed by Russell, Jones and Walker) appeared on behalf of the **Claimant**
The Defendant was not present and was not represented

J U D G M E N T
(As approved by the Court)

MR JUSTICE SILBER: In these proceedings the claimant, Barbara Pollard, a former police officer, seeks an order quashing the decision made by the Police Medical Appeal Board,("the board") dated 25 October 2007 under the terms of the Police Pension Regulations 2006 ("the 2006 regulations") on an appeal brought by the claimant against a decision by a Selected Medical Practitioner ("SMP") which held that her degree of disablement was assessed at nill per cent as "her current disability was not causally related to the index incident in 1974". This overturned earlier decisions of a SMP which were given on 5 March 1987 and 11 May 1988 when the claimant was assessed as 51 per cent disabled as a result of an injury that she incurred in 1974 when she was on duty as a police woman.

The claimant submits that the board erred in law as, first, it acted outside its powers, in that the board exceeded its powers by purporting to overturn the decisions in 1987 and 1988. Second, that the board was estopped from overturning the 1987 and 1988 decisions. Third, that the board acted unfairly and without rational or proper evidential basis because the essential documentary evidence had been destroyed. Fourth, that the board rejected an expert report of Mr Walker without giving proper reasons.

The board, which is the defendant in this proceeding, served an acknowledgment of service indicating that it took a neutral position or the merits of the claimant's application. It attached a copy of the decision of 23 October 2007 which is the decision under challenge. The board has adduced no evidence and has not been represented at the present hearing.

The former employers of the claimant, which was the West Yorkshire Police Authority ("the authority") was served as an interested party. It has not served an acknowledgement of service and has not been represented in the present proceedings. Judge Mackie, sitting as a deputy High Court judge, gave the claimant permission to pursue this claim.

The facts which have led up to this application are that the defendant, the board, was established to hear appeals under, among other provisions, the 2006 regulations. The claimant, who was born on 22 September 1954, joined the police force in 1971. At the time she left, she was serving with the authority.

On 5 April 1974, when the claimant was 19 years old she was involved in the arrest of a woman who was violent and drunk. In the course of arresting this woman the claimant sustained an injury to her back. Her back continued to be painful and she saw the force's medical officer, Dr Ellis, later. Her case before the board was that:

> "He noted my condition and told me to take it easy for a while and to take pain killers. I cannot remember if I went to see my GP at the time. The back pain hardly ever left me and worsened through my police service. I saw Dr Ellis on a number of occasions with this problem and he advised me about looking after my back with exercise, posture et cetera. He asked me to keep him informed but to see my GP if the condition worsened to the point that I could no longer do my job. I did as I was

told."

The claimant's condition worsened and in the early 1980s Dr Ellis suggested she find an inside job which she did, although she was occasionally allocated to police patrol duties. The claimant found these increasingly difficult and Dr Ellis then recommended that she be allocated permanently to indoor duties. Despite this, she continued to suffer back pain. This was so severe that in 1985 Dr Ellis recommended that she see her GP with a view to referral for specialist advice. She was referred to Mr John Cape, an orthopaedic surgeon. In a letter dated 18 November 1985 he wrote that she appeared to have a degenerative lumbar disc. The claimant was medically discharged from the authority with effect from 6 April 1986.

The claimant was then assessed again by separate selected SMPs. First on 5 March 1987, when the SMP recorded:

> "I have decided that the disability, i.e. the lumbar disc degeneration and spondylosis is the result of an injury received in the execution of his duty as a member of a police force ... the degree to which her earning capacity is affected is 51 per cent. I recommend that the police authority should again consider in one year whether the degree of disablement has altered."

Second, Dr Shinn on 11 May 1988 made an identical assessment but did not recommend that the degree of disablement be reassessed. In a letter dated 13 May 1988 he said that he did not consider there was any possibility of recovery and therefore he did not need to see the claimant again.

The claimant's back condition continued to deteriorate. So in 1982 she underwent an lumbar discectomy, an L 4/5. Following this operation, she obtained some relief from sciatica but her back pain continued.

In 2003 the claimant was told by the authority that her disablement would be reviewed. She was then seen by a Dr Freeland as SMP who completed a certificate dated 22 May, and re-dated it on 11 October 2006. He concluded that the claimant was suffering from chronic back lumbar spondylosis and cervical spondylosis, but the degree to which her earlier capacity was affected was 0 per cent. He accepted that the claimant had a significant level of current functional disablement but he reached the conclusion he did because he did not consider there was any sufficient link between the claimant's injury on duty and the level of disability.

In a record dated 11 July 2007 he said:

> "In reviewing the information presented to me I note that an injury on duty award was made and an injury on duty percentage calculation undertaken. However, I could find no evidence in the file that the index incident made a significant contribution to the development of the lumbar disc degeneration."

Dr Freeland also considered that the claimant's then disablement was attributable as to 30 per cent to cervical spondylosis. The claimant accepts that she suffers from this, as

well as degeneration to her lumbar spine. However, it causes no independent loss of earning capacity. It is accepted by the claimant that it is not necessary to resolve this issue because the board decided that none of the claimant's injuries were attributable to an injury on duty.

Dr Freeland reached the decision without sight of the claimant's occupational health records or a full set of the claimant's general practitioner records. By the time the case was referred to him, the authority no longer had any paper or computer records of any contact with the occupational health units. The claimant recalled that Dr Ellis and Dr Shinn had been in possession of these records when they spoke to her in the 1980s, but they had apparently been destroyed by the authority subsequently. It is also clear that when Dr Freeland reached his conclusion part of the claimant's personnel file was available but that it was incomplete and that her general practitioner records were only available from 1979 onwards. No further records were available by the time the case came before the board.

The claimant appealed against Dr Freeland's decision. In her appeal she noted the limited records that were available to Dr Freeland and she drew attention to the fact that those records had become available to the SMPs who had reviewed her case in 1987 and 1988. She also took the point, which is has been reinforced by Mr Westgate in his written submissions before me, that it was not open to the SMP to question the claimant's eligibility for an injury on duty award in the first place.

The authority submitted a response to the appeal in which they accepted that Dr Freeland had not seen a full set of the claimant's general practitioner or hospital records, but they accepted the conclusions of Dr Freeland to which I have referred.

The authority referred to Home Office advice, which was quoted in part but not copied, to the effect that where an injury award had been given in error the case could be referred back to a SMP at which point 100 per cent of the injury could be attributed to the non-injury factors leaving a degree of disable disablement at 0 per cent. I have not seen the copy of the advice and therefore make no comment about it, but I will shortly explain the way I consider the regulations should be applied.

The board sat on 3 October 2007. It comprised a consultant occupational health physician and a consultant in orthopaedic medicine. The claimant relied on a report from a Dr D I Walker, a consultant orthopaedic surgeon, who concluded that the claimant had suffered damage to her intervertebral disc in 1974 and that this had progressed giving rise to the ongoing problems and intervening surgery. He believed that the degenerative change was post traumatic and there was some underlying degree of degenerative disc disease but it would not have prevented her from working in the absence of her accident in 1974. He also believed that the claimant suffered from degenerative disc disease in her cervical spine but this would not have prevented her from working.

The report of the board was given on 25 September 2007. Dr Hutson, the orthopaedic specialist member of the board, had conducted an examination. He concluded that:

> "There is no evidence of tissue injury that could be the consequence of a strain of the lower back sustained when on duty in 1974."

The board accepted that the claimant's level of functional disability was probably such that she could not work part-time but they concluded that this was not attributable to the index injury.

The core of their reasoning, which is set out at page 243 of the bundle, was as follows:

> "The appellant relies on the report of Mr Walker, her orthopaedic surgeon, in supporting her case. Mr Walker comments that her current disability is due to degenerative changes brought on by the index injury. However, his report does not give any indication as to why he believes this to be the case and there is no evidence of his taking a history regarding the index incident, her symptoms at the time or the ten year delay before the decrease in her working capability due to symptoms.
>
> From the evidence reviewed by the board and the account given by Mrs Pollard in direct questioning there is no evidence at all of a catastrophic injury to her back. This is supported by the lack of symptoms and the lack of need for medical consultation/intervention.
>
> From an etiological point of view, the board consider that the index incident is likely to have resulted in a soft tissue injury which would be expected to have recovered in a short period of time. The fact that Mrs Pollard did not require to see her general practitioner/occupational physician or other doctors at this time, supports this contention.
>
> The gradual onset and progression of symptoms over a long period of time would support the contention that this was due to constitutional degenerative change, rather than as a result of a causal event, such as the assault many years before.
>
> The sudden onset of sciatic symptoms some six years after she had left the police service would fit well with the known etiology of disc prolapse, which occurs set against the background of degenerative change.
>
> The board are of the opinion that at best, the index incident merely accelerated the onset of symptoms in an otherwise symptomless back. In the Jennings determination, it was decided that a relatively minor injury that accelerates the onset of symptoms is not considered an injury on duty. In such circumstances, the level of economic disability caused by the index incident would be 0 per cent, irrespective of the earning capability of the appellant."

I should explain that, although the claimant was retired under the Police Pension Regulations 1973, her case now falls to be dealt with under the 2006 regulations. They came into effect on 1 April 2006 and anything done under the former regulations has effect as if it was done under the 2006 regulations.

By regulation 11 an injury pension and gratuity is payable "to a person who ceases or ceased to be a member of the police force and is permanently disabled as a result of injury received without his own fault in the execution of his duty."

The amount of injury pensions payable depends on the degree of the officer's disability as set out in schedule 2, and it is then determined particularly in accordance with regulations 7(5) which states that:

> "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: provided that a person shall be deemed to be totally disabled if, as a result of such an injury, he is receiving treatment as an in-patient at a hospital."

The degree of disablement is subject to revision from time to time in accordance with regulation 37 and this is what happened in this case. Regulation 37 provides that:

> "(1) Subject to the provision 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 the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly."

Certain questions under the 2006 regulations fall to be determined by a SMP and on appeal by the board. Regulation 30(2) provides that:

> "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 following questions --
>
> (a) whether the person concerned is disabled;
>
> (b) whether the disablement is likely to be permanent.
>
> except that, in a case where the said questions have been referred for decision to a duly qualified medical practitioner under regulation H1(2) of the 1987 Regulations [or regulation 69 of the 2006 Regulations], a final decision of a medical authority on the said questions under Part H of the 1987 Regulations [or, as the case may be, Part 7 of the 2006 Regulations] shall be binding for the purposes of these Regulations;
>
> and, if they are further considering 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."

The underlining is mine.

By regulation 30(6) it is provided that:

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

I should say that regulations 31 and 32 deal with appeals and further referrals.

The language of regulation 7(5) may in some cases require the SMP to apportion the loss of earnings capacity between a duty injury and one or more non-duty injuries or conditions.

Where there is a single injury or condition it is said by Mr Westgate that if its impact, part caused by injury on duty and part caused by some other factor, then, in the words of Stanley Burnton J, as he then was, in R (South Wales Police Authority) v Geoffrey Richard Morgan and Nigel Lewis Davidson [2003] EWHC 2274 (Admin) at paragraph 75:

> "... in accordance with normal principles of causation it is sufficient if the duty cause is a substantial cause of the injury."

If it is, then an injury award must reflect the whole of the degree of disablement caused by that injury or condition.

Where the effect of an injury is merely to accelerate the onset of a condition that would independently have caused the same loss of earning capacity in that event, then the injury on duty is, according to Mr Westgate, not the cause of the officer's permanent disability. He refers to Home Office guidance which he says supports that. I have not seen that and I do not make any further comment on it.

Mr Westgate, counsel for the claimant, submits that the board exceeded its duties under the 2006 regulation by purporting to overturn the decisions in 1987 and 1988, when it concluded that the disability caused by the incident to the claimant was 51 per cent. He points out that in the 1980s the SMPs had determined in the claimant's favour (a) whether the claimant was disabled, (b) whether the disablement was likely to be permanent and (c) whether the disablement is as a result of an injury received in the execution of a duty. He stresses that there had been no appeal or further referral under regulation 32 and so those respective decisions by the SMP were final pursuant to regulation 30(6). He points out that the SMP decisions had each identified the nature of the disablement as being a single condition, namely "lumbar disc degeneration spondylosis".

According to Mr Westgate, paragraph (c) of regulation 30(2) requires the SMP to consider whether the disablement is the result of a duty injury and that refers back to the disablement referred to in paragraph (b), which in this case was the lumbar disc degeneration and spondylosis. Thus he says that the decisions in 1986 and 1988 conclusively decided that the claimant's lumbar disc degeneration and spondylosis was caused by a duty injury. He says that when the matter was referred back to the SMP in 2003 under regulation 37 the only question for the SMP to determine was question (d) was regulation 30(2), namely the degree of the disablement of the officer. He stresses that the injury on duty question had already been conclusively determined in the claimant's favour, so the only question for the SMP and the board on appeal was the degree to which her earning capacity had been affected by lumbar disc degeneration and spondylosis.

The complaint of the claimant is neither the SMP nor the Board answered this question. Instead they reached a decision that the degree of disablement was 0 per cent by a direct consideration of question (c), "namely whether the claimant's undoubted lumbar disc degeneration was caused by an injury on duty." He points out that the board went wrong by carrying out a fresh investigation into the question of causation on the merits. This was not permissible at this stage of the enquiry. It is noteworthy, he says, that although the board went wrong in this way, they had originally correctly identified the question when it said:

> "The question of whether the appellant was entitled to an injury award is not a question for a board. It has no authority to cancel an injury on duty once a police authority has granted such an award and will not be considered further."

In my view it is necessary to consider what the regulations require of SMPs when they are faced with a claim that a police officer has been injured on duty.

In my view the regulations show five matters. They are:

1. There are four issues to be considered by the police authority and the SMP to whom it is referred when faced with an application that an officer is permanently disabled. They are set out in regulation 30(2). They can be paraphrased as follows: (a) whether the person concerned is disabled; (b) whether the disablement is likely to be permanent; (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.

2. The decision of the SMP on the issues referred to him are final, subject to appeal or a review or reference back (see regulation 30(6)).

3. Where an injury pension is payable, the police authority shall at suitable intervals, in the words of regulation 37, consider whether:

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

accordingly."

4. Regulation 37 does not enable an authority to reach a different conclusion on the issues specified in regulation 30(2)(a), (b) and (c) but only on the matters set out in regulation 30(2)(d) which relate to the degree of the person's disablement. Indeed, this is made clear in the closing words of regulation 30(2) which I have emphasised.

5. Therefore the question of whether a person is entitled to an injury award cannot be considered on a regulation 37 review and so the board has no authority to cancel an injury award on the basis that the disablement was not the result of an injury received in the execution of duty.

Applying those principles in this case, I am satisfied that the decision of the board contained an error of law as it sought to go outside the matters which it had jurisdiction to consider and that the board was at fault when it was considering whether the disablement of the claimant was a result of an injury received in the execution of her duty. In my view, the decision of the board must be quashed. It is unnecessary for me in those circumstances to consider Mr Westgate's other submissions but I would be grateful for submissions on the order I should make.

MR WESTGAGE: My Lord, I am grateful. There are a couple of matters. One is I think your Lordship referred to schedule 2 when it should be schedule 3.

There are a couple of points that arise from what your Lordship has just said in relation to the board cancelling the injury award. The effect of their decision would not be to cancel the award. What it would be would be to reduce the amount of the earnings guaranteed at a lower span. So reduce to 30 per cent rather than 70 per cent. May be the language of cancellation might be -- should be revised.

MR JUSTICE SILBER: These comments will be noted and I am sure when I get the transcript back I will make the changes.

MR WESTGAGE: There is one other point, which is that your Lordship referred to the submission to the effect that where the effect of the duty is merely to accelerate the injury on duty. That is, of course, the purpose of disablement. Your Lordship has, if I may say, referred to that in somewhat qualified terms because the Court of Appeal has since revised the decision in Jennings that deals with that.

MR JUSTICE SILBER: I don't think that needs any --

MR WESTGAGE: I didn't address it earlier on because it is really a footnote to a footnote. I simply mention it.

The form of the order that I would seek is that which I have set out at the end of my skeleton argument, which is that the matter be remitted to a differently constituted board to consider the question whether there has been --

MR JUSTICE SILBER: The decision has to be quashed and referred to a different board.

MR WESTGAGE: That is right.

MR JUSTICE SILBER: Would you like to draft a copy of the order?

MR WESTGAGE: Yes, I would.

MR JUSTICE SILBER: Any other order? Costs?

MR WESTGAGE: The defendant has not attended in accordance with normal practice and I would not seek costs against them as a judicial body. I also don't seek them against the interested party.

MR JUSTICE SILBER: Good. Thank you very much. If I may say so, your skeleton argument and the information you put in it was very helpful.