

**Basis for Appeal**

Mr [redacted] is appealing against the decision of the SMP to reduce his degree of disablement from Band 3 to Band 1.

**Occupational History/Background to Case**

After leaving school Mr [redacted] served a six year apprenticeship in Mechanical Engineering and was a Mechanical Fitter with De La Rue.

He was called up for National Service in the army and joined Northumbria Police in 1967.

He served as a Constable until he was ill health retired in 1989 after 22 years service.

He was deemed to be disabled due to lumbar disc lesion and was granted an injury on duty award, which was set in Band 3.

Mr [redacted] was reviewed in November 1995 and the award remained in the same banding.

He has undertaken no work since leaving the Police but claims he would have worked beyond the age of 65.

The Police Authority carried out a further review in February 2009 and in accordance with Home Office Circular 46/04 recommended that the SMP reduce the degree of disablement to Band 1 since he had reached State Retirement Age and was not expected to be in employment.

The Police Authority considered that there were no cogent reasons why the SMP should not reduce the degree of disablement to Band 1 and, as he is now age 71, there is no loss of earnings and therefore the Appellant should be placed in the lowest Band.

The Appellant disagrees with the reduction, citing incorrect procedures by the Police Authority and the SMP and quotes both the judgment in the case of *Turner* and the findings of the Pension Ombudsman in the case of *Ayre* to support his case.

The Board reminded both parties that the task for the Board was not to determine if there had been pension maladministration, merely to determine the current degree of disablement.

**Submission by the Appellant and Representatives**

The following represents the key points made in the submission on behalf of the Appellant:

- Issues in relationship to cogency and the Home Office Circular are totally irrelevant.
- The issue for the Board is the degree of disablement.
- Following the cases of *Turner* and *Laws*, the SMP Dr. Broome did not apply the case law correctly.
- Home Office Guidance is not in compliance with the Regulations.
- The Appellant was not examined by the SMP.

- The SMP had been told by the Police Authority to reduce the degree of disablement to Band 1 because he was over the age of 65.
- It is argued that the SMP must follow the Regulations in determining the degree of disablement.
- It is wrong to assume that, just because the Appellant is over 65, he has no earnings capacity.
- The Pension Ombudsman in the case of *Ayres* ruled that the Police Authority was wrong to assume that there was no earnings capacity and that the review had not followed the Benefit Regulations.
- A Police Authority is only entitled to review the pension, if the level of disability has altered and that alteration must be substantial.
- There is significant ambiguity with regard to the SMP's actions in this case.

#### **Comments made by Police Authority on the submission by the Appellant**

Circular 46/04 from the Home Office is not mentioned in the cases of *Pollard*, *Turner* or *Laws*. Therefore it (the circular) remains the basis for the decision in this case.

#### **Review and Clarification of Medical Issues**

The Board sought clarification from the Appellant's representative over his use of the words disability and degree of disablement as the words were not synonymous.

In medical terms degree of disability merely relates to the medical condition whereas degree of disablement has a specific definition within the Police Pension and Benefit Regulations.

It was confirmed that Mr [redacted] had left school at the age of 15 with no qualifications and undertook an apprenticeship between the ages of 16 and 21.

He had worked thereafter as a Mechanical Fitter before he had undertaken National Service at the age of 22 for a period of two years.

On his release from the army he went back to work as a Fitter until he joined the Police in 1967 at the age of 28.

Mr [redacted] confirmed that although he had tried on many occasions to pass the Sergeant's exams; he had failed on each occasion.

Subsequent to his retirement at the age of 60 he had gained a GCSE in mathematics.

He confirmed that he had undertaken no work since his retirement and never applied for any work, because he did not feel fit enough to carry out any work, as a result of his qualifying injury.

He had wanted to work as a Police Officer for two years past the retirement age of 55 in order to complete 30 years service and obtain a full pension.

He described himself as skilled in IT in an amateurish way and is able to surf the net and send emails. He has been self-taught in this regard.

Following his retirement he had hoped to work in the Courts, as an Usher or in Court Office Administration.

Mr confirmed that he sleeps well, although has been prescribed Zimovane for the last six to seven months because of the stress caused by his pension review and financial embarrassment.

He confirmed that he was able to self-care without help and is able to take his grandchildren to school each day walking 400 yards in each direction.

He is able to read a newspaper and use his computer.

Although he claims not to do any housework, he does do occasional Hoovering and he is able to help with the washing up and general tidying up around the home.

However he has not been able to undertake any DIY because he does not feel physically fit enough.

He drives locally and he was able to pursue his hobby of Crown Green Bowling until he had to stop six years ago because of his infirmity.

Clinical information regarding his qualifying injury was ascertained and will be reported within the Specialist Report.

#### **Submission by the Police Authority Representatives**

The following represents the key points made in the submission on behalf of the Police Authority.

- This appeal is about the reduction of the injury on duty award from Band 3 to Band 1.
- Dr Broome had followed Home Office Guidelines correctly.
- It had been determined that there were no cogent reasons why the Police Authority should not make a recommendation to the SMP, in accordance with the Home Office Guidance, that he could reduce the award to Band 1.
- Most of the submission on behalf of the Appellant appears to relate to pension maladministration; there is no cogent argument put forward, as to why the SMP should not have reduced the degree of disablement to Band 1, in accordance with Home Office Guidance.
- The SMP had carried out an assessment of the case and it was his personal decision.
- He may have received advice from the Police Authority, as they are entitled to offer such advice, but the decision remained that of the SMP.

- If the Appellant had submitted cogent reasons, he could have been seen by the SMP. However in the absence of a cogent reason the SMP did not feel that a medical examination would make any difference to his decision.
- The SMP is entirely independent of the Police Authority and he decides his own process.
- Mr [redacted] has not been treated any differently to any other pensioner.
- The Appellant has produced no cogent arguments as to why the Police Authority should not follow the Home Office Guidance and the Police Medical Appeal Board should also follow the Home Office Guidance in this case.

#### **Comments made by Appellant on the submission of the Police Authority**

The National Association of Retired Police Officers (NARPO) had received a letter from the SMP, which indicated that he had no room to manoeuvre and was unable to discuss the case. Nevertheless he is the one who decides the level of earnings capability.

In a further document received from the SMP, it was clear that he had refused to discuss cogent reasons, as this was an issue for the Police Authority, rather than it being a medical decision.

The Chief Constable had said that cogency was to be decided by the Police Authority and if there were cogent reasons then they would be passed to the SMP.

The SMP further stated that he is not allowed to disagree with the Human Resources Department on this matter.

Nevertheless he is not in compliance with Home Office Guidance or the Regulation on the way he carried out the review. The Police Authority considers that the issue of cogency is one for it to make and not the Doctor.

The SMP should have carried out an assessment of any change from the previous pension review in 1995.

The SMP has advised NARPO that he does not get to see the Occupational Health Records for any of the former Officers over the age of 65.

It is clear that the procedure is unlawful and is not in accordance with the Guidance. There has been a meeting with the Home Office and they are in fact reviewing the issue of Guidance in relationship to the over 65's and a document is likely to be submitted for consultation at the end of January 2010. It is likely that this will require a face to face interview with the SMP.

#### **Review and Clarification of Medical Issues**

The Police Authority representative was asked to confirm whether there were any special arrangements in the Regulations, for former Officers over the age of 65; it was confirmed that there is no such provision.

Nevertheless, he considered that the Force had followed fully Home Office Guidance 46/04.

In relationship to the Pensions Ombudsman in the case of Ayre, the decision in that case, is not binding on any other case. It merely applies to Mr Ayre and Humberside Police.

The Police Authority representative reiterated that the Board must follow Home Office Guidance and there were no cogent reasons put forward.

#### Final Comments

##### Appellant

There were none.

##### Police Authority

There has been no detriment to Mr Greig's pension entitlement because of his taking early retirement.

Mr Greig was not required to work in order to avoid penury.

Home Office Guidance and Guidance to the Police Medical Appeal Board from the Home Office should be followed in relationship to the issue of cogency.

#### Results of Clinical Assessment Performed By Consultant Specialist

##### History

It has been established and accepted that the appellant had two index injuries, both of which affected his lumbosacral spine, and which resulted in his medical retirement from the Police Force 20.10.89.

The diagnosis was lumbar disc lesion and the degree to which the officer's earning capacity was affected was 50-75%.

This was reduced to 0% following a paper review in February 2009.

The purpose of this appeal is to settle the dispute concerning the "degree of disablement".

*The appellant had had intermittent and relatively short-term back symptoms prior to the first index injury in June 1986. The symptoms he developed following this injury were different to any of his previous back symptoms. The pain was acutely severe and constant. While there was some pain in the lower lumbar spine, the main pain was in the buttock, right more than left, with a slightly different type of "nerve pain" and a sensation of numbness in the lateral right thigh and calf and into the right foot affecting all the toes. He was aware of a mild sensation in the left lateral thigh at times. The pain was present night and day and was unresponsive to rest and analgesia. He was also aware of some minor urinary leakage after voiding his bladder (which has continued to this day). He was continent of faeces although tended to constipation. A myelogram was eventually ordered (CT and MRI were not available at that time). This showed a significant disc prolapse and surgery was advised and carried out. The relief of symptoms was immediate and complete although he continued to dribble urine after voiding his bladder.*

Within five months he was able to return to full operational duties and remained symptom-free until the second index injury in September 1988. Following this injury he had a

recurrence of similar symptoms to the 1986 episode although possibly not quite as severe. He had a second myelogram and again underwent lumbar spinal surgery. This time, symptoms continued post-operatively and have continued to be present and constant ever since. The symptoms are present day and night and have not changed significantly either for better or worse since the operation in 1988. He rates them as 8/10 on VAS. The buttock pain is the main pain on the right but he is also aware of a sensation of numbness in the right buttock and lateral right thigh. He did not return to work after the second operation and was medically discharged.

He takes oral analgesics regularly with possibly some effect. He has been reviewed in the pain clinic but the options were limited and ineffective.

The situation now therefore can be described as stable there having been no major changes in his symptoms since the second operation in 1988 and since his last review in 1995.

Despite the apparently constant pain, he sleeps well and undisturbed throughout the night though in the last six months he has been on a mild sedative because of concerns about his pension appeal. Activities of daily living are not a problem and he does some minor housework. He walks the grandchildren to and from school over a quarter of a mile each way without a problem and can shop with his wife and carry some shopping. He sits at the computer (his wife says it is for hours) and he sat for the Board without apparent trouble and can sit to drive short distances. He managed to study for and successfully pass a GCSE in Maths aged 60. He has not worked or applied for work since 1989.

#### Past Medical History

1. Several inguinal hernia operations over the past twelve years.
2. Varicose vein operation.
3. Haemorrhoid operation.
4. He has been seen about upper limb tremor – thought to be age related.

#### Drugs

1. Co-codamol
2. Ibuprofen (taken regularly)
3. Zimovaine for six months

#### Investigations

Two myelograms in the 1980s but nothing recently.

#### Physical Examination

- On examination he is fit for his age and not overweight.
- Minor fine tremor affecting both hands.
- Gait normal. He was able to heel and toe walk.

- *Abdomen soft, no masses. Hernial scars and a small central mid-line hernia.*
- Hips normal.
- All pulses present.
- Well healed operation scars over lumbosacral spine.
- No deformity.
- No local tenderness.
- No muscle spasm.
- Extension 30%, flexion 40%, laterals flexion 10%.
- No major discomfort on movement.
- Straight leg raise right 40, left 70.
- Reflexes bilaterally present and symmetrical but absent at the right ankle.
- *Muscle tone normal.*
- Power normal.
- Reduced sensation to touch and pinprick, right L1 and 2 (lateral thigh) and more significantly over S2 to 4 on the right.

#### Conclusion

1. The history and examination not only confirm the clinical diagnosis of lumbar disc lesion but also confirm its permanence. In addition there are symptoms and signs to suggest some degree of cauda equina involvement.
2. Clinically his medical condition is stable. There is some conflicting evidence as to the severity of his pain symptoms at this time. He says his symptoms are no worse over the years but neither have they improved.
3. To support the appellant's statement in paragraph six of "cogent reasons" in his submission with form C that "it was his firm intention to work beyond 65", his functional capability would allow him to carry out a semi-sedentary job for a minimum of four hours per day and there is no medical contraindication to this.

## CASE DISCUSSION

### Key Medical Considerations

The Board will need to determine:

1. The functional capability of the Appellant;
2. The medical conditions leading to reduced functional capability;
3. Whether the clinical findings and stated medical condition support the plausibility of the stated functional capacity;
4. What type of work the Appellant may reasonably perform, taking into account their functional capability, training, and occupational experience?

### 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.



*Crockèr 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 and evidence.

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 *cauda equina* lesion 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 November 1995 but that it had remained static following his surgery in 1988.

The Board had established that Mr [redacted] had wanted to work after the age of 65, working as a Court Usher, or in an Administrative role within the Court. However he had never applied for this or any other job following his ill health retirement on the basis that he did not feel able to do the work.

The Board considered that, even with his disabling condition, the Appellant was at this point in time capable of working at least four hours per day in a semi-sedentary role such as a Close Circuit Television Operator.

However it has been established that such a role existed at the time of his last review in 1995 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 *Crockèr*, as to whether an employer would pay him to do the work, being that he is now age 71; 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 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 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 be 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 Greig should remain in Band 3 as there has not been a substantial change in the degree of his disablement since the last review in 1995.

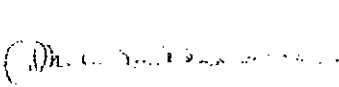
There is no doubt, that the Board would have to agree that, if they were to determine the case on the issue of cogency, as outlined in the Home Office Guidance, in view of the fact that the Appellant has produced no cogent argument, the outcome of this appeal would be different.

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 uphold the appeal of \_\_\_\_\_ on the basis that there has been no substantial change to the degree of disablement since his last review in 1995. The degree of disablement therefore remains in Band 3.

**Signatures of Each Board Member**



Dr David Wallington



Dr Daphne Pereira



Mr Mike Smith

05 January 2010