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Of England and Wales



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FROM THE GENERAL SECRETARY'S OFFICE

IR/sg

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**JBB CIRCULAR NO : 94/2008**

Dear Colleagues

**POLICE INJURY BENEFIT REGULATIONS 2006 – FREQUENTLY ASKED QUESTIONS  
(FAQ) GUIDE**

I attach for your attention an FAQ guide in respect of the above Regulations.

This FAQ guide represents our current view of the legal position and best practice as at 1 October 2008. You should be aware that this is an area where the legal position can change and at the time of drafting this document the Home Office is conducting a consultation exercise with a view to making some changes to injury awards.

I hope that you will find the document helpful.

Yours sincerely

**IAN RENNIE**  
General Secretary

# **POLICE INJURY BENEFIT REGULATIONS 2006**

## **INJURY AWARDS – DEGREE OF DISABLEMENT**

### **FREQUENTLY ASKED QUESTIONS**

#### **INTRODUCTORY & BACKGROUND**

The purpose of this document is to set out some of the most commonly asked questions in cases involving degree of disablement. Many of these questions tend to arise on reviews.

It is not possible in a document like this to provide a definitive and exhaustive statement of every aspect of the legal position. If you are uncertain about any aspect of a case you are handling you should seek further advice initially from the JBB Secretary or if necessary the appropriate rank General Secretary.

This Q & A represents our current view of the legal position and best practice as at 1 October 2008. You should be aware that this is an area where the legal position can change and at the time of drafting this document the Home Office is conducting a consultation exercise with a view to making some changes to injury awards.

#### **Section 1: the legal framework and guidance**

##### **1. Which legal provisions and guidance are potentially relevant?**

The legal provisions regulating injury awards are found in the Police Injury Benefit Regulations 2006 (“PIBR 2006”).

The following guidance is also relevant:

- Home Office guidance to Police Medical Appeal Boards (“PMABs”). Section 5 deals with degree of disablement (referred to below as “the Home Office guidance”)

[http://police.homeoffice.gov.uk/publications/human-resources/PMAB\\_Guidance/section5?view=Binary](http://police.homeoffice.gov.uk/publications/human-resources/PMAB_Guidance/section5?view=Binary)

- Home Office Circular 46/2004 – Annex C has guidance about degree of disablement (although this is out of date in certain respects – see Section 5 below).

##### **2. Do the PIBR still apply even if the member was retired prior to 2006?**

Yes. The PIBR contain the provisions in relation to injury awards that used to form part of the Police Pensions Regulations 1987. Regulation 9 PIBR states that anything done under the earlier regulations is treated as having been done under the PIBR.

### **3. Does the guidance still apply even if the member was retired before it was issued?**

Yes. Issues in relation to reviews and HOC 46/2004 are dealt with in more detail in Sections 4 and 5 below.

## **Section 2: the assessment of degree of disablement**

### **4. What is degree of disablement?**

“Degree of disablement” might be thought to imply a reference to the extent of the member’s physical or mental infirmity. It is important, particularly when considering the issue of apportionment, dealt with below, to understand that it this is not the case.

Degree of disablement is the degree to which the member’s earning capacity has been reduced as a result of the relevant duty injury (see regulation 7(5) PIBR).

### **5. How is degree of disablement assessed?**

The PIBR provide that it is for a doctor, the SMP (or the PMAB) to assess degree of disablement. No guidance is given in the regulations as to how it is to be assessed.

There is some guidance from the courts on the correct approach. In South Wales Police v Anton the court indicated that in each case it is necessary:

- (i) to assess the loss of earning capacity; and then
- (ii) to assess the extent to which this was caused by the duty injury.

In considering (ii) it is necessary “to discount the effect of any non-qualifying injury and any other cause whether classified as an injury or not”.

The court also emphasised that the test is not whether the officer can actually get a particular job, rather whether medically they are capable of it.

The Home Office issues guidance to PMABs on degree of disablement (see link in Q1 above). Where the pensioner is below 65, the assessment of degree of disablement involves:

1. establishing a benchmark, which will be
  - a. where the calculation is at or around the point of medical retirement, the officer’s pensionable salary without overtime;
  - b. where the calculation is at some point after leaving police service, the pensionable salary figure is revalued to the current figure for the pay point the officer left at;
  - c. where the pensioner has reached police retirement age, national average earnings (taken from the Annual Survey of Hours and Earnings – ASHE) – unless there are cogent reasons for using a different figure;
2. assessing the pensioner’s current earning capacity;
3. calculating the reduction in earning capacity expressed as a percentage, by comparing the benchmark figure with current earning capacity; and
4. considering the extent to which the reduction results from the relevant injury. This involves considering whether there is any other cause of the reduction in earning capacity, such as a non-duty injury, and, if there is, reducing the

degree of disablement to take account of this. This stage is known as 'apportionment' (see below).

#### **6. Can the FMO act as SMP?**

It is for the police authority to appoint the SMP. There is no absolute bar on the FMO acting as SMP. The SMP does however act in a quasi-judicial capacity and must be able to do so. In the related context of medical retirement, the PNB guidance annexed to Home Office Circular clearly anticipates that the FMA will not generally be the SMP. There is unlikely to be a legal challenge if the FMA does act as SMP, as the pensioner has the right of appeal to a PMAB.

#### **7. Is it appropriate to use pensionable police earnings to establish the benchmark?**

There is no case on the point, but we consider that the approach adopted is likely to be upheld as reasonably workable and appropriate. If in a particular case a pensioner considers that his or her earning capacity was higher s/he can attempt to argue that, although we are sceptical about the prospect of this succeeding.

#### **8. Is it appropriate for the police authority to use job vacancies or advertisements to establish the level of earning capacity?**

There are two aspects to the assessment of current earning capacity: what employment can the pensioner medically undertake; and what would that kind of employment pay. The assessment of the types of work that a pensioner can medically perform is one for the doctor. If the SMP concludes that the pensioner can medically perform a particular job, then job advertisements are likely to be regarded as an appropriate means of assessing the level of potential earnings.

#### **9. What if the pensioner cannot do the job in question because there are no vacancies in his or her area or for a similar reason?**

The test is whether the pensioner could medically do the job, not whether s/he can actually get the job. The Home Office guidance to PMABs does however indicate at paragraph 10 that the pensioner's background, skills and qualifications are relevant, so s/he can refer to these points.

#### **10. Is a pensioner's earning capacity the same as his or her current earnings?**

Not necessarily. While by definition, a pensioner's earning capacity must be at least his or her current income from employment, earning capacity could be higher than current income. For example, a pensioner may choose to work limited hours or do a relatively undemanding job or run a business which is not particularly profitable. Earning capacity is calculated by what the pensioner is capable of earning, not what they are currently earning.

### **Section 3: apportionment**

#### **11. What is apportionment?**

"Apportionment" is the term used to describe the stage of the assessment of degree of disablement where any factors other than the relevant injury which reduce earning capacity are taken into account.

Once loss of earning capacity has been assessed, it is necessary for the SMP/PMAB to assess the extent to which this loss was caused by the duty injury, as opposed to any other factor.

Apportionment is dealt with in the Home Office guidance at paragraphs 22 – 26. It emphasises at paragraph 23 that for apportionment to be appropriate the non-injury on duty factor “must separately have caused some degree of loss of earning capacity on its own”.

Some examples are given:

- (a) more than one medical condition causing loss of earning capacity (paragraph 24 of guidance);
- (b) more than one injury within same condition causing loss of earning capacity (paragraph 25); and
- (c) a qualifying injury exacerbating a pre-existing condition (paragraph 26) – see next question.

**12. Should apportionment be applied to reduce degree of disablement where the duty injury exacerbates a pre-existing condition?**

No, not unless the pre-existing condition had already affected earning capacity. This issued was addressed in Anton and is dealt with the Home Office guidance at paragraph 26 which states:

“There is also the situation where loss of earning capacity is attributable to a qualifying injury exacerbating a pre-existing condition. Apportionment is appropriate here only where the underlying condition, on its own, had also caused a loss of earning capacity. The suggested test is the question: Would there have been a loss of earning capacity but for the injury?”

**13. Should apportionment be used where the disablement caused by the duty injury also has other causes?**

No. The disablement is deemed to be the result of an injury on duty if it is caused or substantially contributed to by the relevant injury. Any non-duty cause of the disabling condition should be disregarded at the apportionment stage, unless that other cause had also caused a loss of earning capacity.

**Section 4: reviews of degree of disablement**

**14. What powers does a force/police authority have to review degree of disablement?**

Regulation 37 PIBR provides that a police authority “shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered”. Where this is done, regulation 30(2) requires the police authority to refer the question of the degree of disablement to the SMP.

**15. How often should reviews take place?**

The PIBR do not provide for reviews at any particular interval. Many police authorities have regular reviews at five year intervals, but on the facts of a particular case a different interval (shorter or longer) may be appropriate.

**16. Can a review be conducted even if the member was not warned about the possibility of a review, or if the member was told that there would be no reviews?**

Yes. Regulation 37 imposes a duty ("shall") on the police authority to consider whether degree of disablement has altered. While it is unsatisfactory for pensioners not to be informed of the possibility of a review, this does not affect the existence of the duty.

In some cases the SMP may have recommended that there be no review, or the member may even have been told that there will be no review. While this is highly unsatisfactory, it will not prevent a review taking place.

**17. Is judicial review available to prevent a review if a member has been assured that there will be no reviews?**

Even in a case of a clear assurance that there will be no review, judicial review is unlikely to be available. Any application would have to be based on the assurance amounting to the member having a "legitimate expectation" that there would be no review. However, in view of the clear duty under the PIBR on the police authority to arrange reviews, no such expectation is likely to be regarded as legitimate.

**18. Can a review be stopped by reference to arguments based in contract, estoppel or human rights?**

No. The position is similar to that dealt with in the previous question.

**19. Is a claim in negligent mis-statement possible?**

It is most unlikely that such claims will arise.

In order to bring a claim a member would need to show:

- a relevant duty of care on the part of the police authority;
- breach of the duty; and
- recoverable loss

Establishing a relevant duty of care is not necessarily straightforward; the quasi-employment relationship may be insufficient to establish a relevant duty without a further explicit acceptance of responsibility by the police authority.

Furthermore, in practice, assurances are often hard to prove or the "assurance" may in fact have been a recommendation by the SMP or FMA, which is not the same thing and will probably not amount to a breach, even if a duty is established.

Even if these difficulties are overcome, the approach to compensation is not that the member should be put in the position s/he would have been in if the representation had been true (i.e. that there would be no review). It is rather that s/he should be put in the position s/he would have been in if the representation had not been made (i.e. if s/he had known that there could be a review). Establishing loss in such circumstances is likely to be difficult.

**20. Can a member complain to the Pensions Ombudsman?**

The Pensions Ombudsman has the power to investigate maladministration in relation to pensions and to award compensation. A member can complain to the Ombudsman in relation to the handling of his or her injury award.

It is first necessary to go through the Force's Internal Dispute Resolution Procedure ("IDRP").

We have had a number of Ombudsman complaints dealing with "unexpected" reviews of degree of disablement. The following themes emerge from the approach adopted by the Ombudsman's office in these cases:

1. It is clear that the Ombudsman will refuse to prevent a police authority from conducting a review of degree of disablement, regardless of any assurances that there would be such reviews. The duty under the PIBR to review is seen as preventing such a finding;
2. where any review has not resulted in a reduction in the member's injury award, the Ombudsman is likely to emphasise the absence of financial loss;
3. it is important to understand that in any event, financial loss will not be considered on the basis of the position if the award had not been reduced. Rather, in order to demonstrate loss, it would be necessary to show that the assurance of no reviews itself (i.e. not any reduction in the award) caused the member loss. This is likely to be difficult; and
4. while there is power to award limited compensation for distress, it appears that the Ombudsman will require the complainant to have been put to a great deal of trouble before such (limited) compensation will be considered.

**21. Is a personal injury claim likely to be possible for stress caused by a review?**

We do not consider that such claims are likely to be possible.

**22. Can the SMP or PMAB at a review take a different approach to that adopted when the award was made or at a previous review?**

Generally, yes. The only question on a review is what is the degree of disablement. This does however involve the SMP or PMAB deciding what, at that point, they consider to be the impact of the relevant injury on earning capacity. Case law suggests that the medical authority can reach its own medical judgment on its view of the evidence at that point.

**23. Can apportionment be applied at a review?**

Yes. Apportionment may be particularly likely and could have a significant impact if the SMP/PMAB considers that by the time of the review the pensioner would have had the same reduction in earning capacity even if the injury had not occurred.

**24. Can degree of disablement be reduced even if the member's medical condition has not improved?**

Yes. See question 4 above. Degree of disablement is the degree to which the member's earning capacity has been reduced as a result of the relevant duty injury.

It is possible for this to have reduced without the pensioner's condition improving, or even if his or her condition has deteriorated,

**25. Can a member ask for a review?**

A member cannot demand a review as of right under the PIBR; the duty is upon the police authority. However, if the member has a good reason for believing a review to be appropriate a request can be made of the police authority.

A good reason is likely to require some medical evidence of there being a deterioration of the member's medical condition and this being related to the injury. It would not be a good reason to try to re-open a previous decision that the member disagreed with.

**26. Can degree of disablement be reviewed without a decision by the SMP?**

No. regulation 30(2) PIBR clearly states that the police authority must refer the question to the SMP for decision.

**27. Can the SMP reach a decision without examining the pensioner?**

Yes, but only if the member agrees. While the PIBR do not provide for the right to an examination, we consider that the nature of the SMP's role is such that an examination must be conducted if the member requires it.

**Section 5: reviews at police retirement age and state retirement age**

**28. What reviews are carried out at retirement age?**

The Home Office guidance recommends that reviews of degree of disablement should be carried out when the member reaches police retirement age and again when the member reaches state retirement age. Our experience is that most forces are putting this recommendation into practice and carrying out reviews at these points.

**29. What is the effect of HOC 46/2004 and is out of date?**

The current Home Office guidance (see link in Q1) recommends review at police retirement age using an average earnings figure, rather than police earnings, to set the benchmark figure for the degree of disablement calculation. It updates HOC 46/2004 in the following respects:

- the impact of the change in compulsory retirement age for police officers is dealt with. In short, if the pensioner would not have reached the old CRA before the change, the new CRA should be applied;
- the reference to national average earnings is updated to the Annual Survey of Hours and Earnings – ASHE figure; and
- it is acknowledged that the age discrimination regulations highlight the need to consider each case on its merits.

**30. How does the review at police retirement age work and is the use of national average earnings as a benchmark appropriate?**



The approach introduced by HOC 46/2004 is in short that once a former officer reaches what would have been his or her compulsory retirement age it is no longer appropriate to use a police pay scale as the basis for his or her pre-injury earning capacity. In the absence of a cogent reason to demonstrate that the member would have had a higher or lower earnings level outside the police after reaching CRA, it is suggested that the new basis for the benchmark for the person's earning capacity, had there been no injury, should be the national average earnings figure – ASHE (see previous question).

We consider that the guidance adopts a logical approach which is consistent with the purpose of the injury award and is likely to be regarded as a sensible and appropriate attempt to make the regulations work in practice.

In relation to the approach adopted regarding age, it can be argued that the difference in approach at compulsory retirement age is discriminatory on grounds of age in that it makes assumptions about earning capacity on the basis of age. It is however possible that these assumptions may be regarded as justifiable, particularly as it is accepted that if a cogent reason exists for suggesting earning capacity to be higher, then this can be considered. This and the procedural requirements of the PIBR on a review for the matter to be referred to an SMP with an appeal right to a medical appeal board, means that any pensioner for whom the assumption is inappropriate can raise it with the SMP/PMAB.

### **31. How does the review at state retirement age work and is it lawful?**

The approach introduced by HOC 46/2004 is in short that once a former officer reaches the age of 65, in the absence of a cogent reason otherwise, the SMP may place the former officer in the lowest band of degree of disablement (band 1, 0 – 25%). This is on the basis that at such a point the former officer would normally no longer be expected to be in employment in any event.

In relation to the approach adopted regarding age, as in the previous question it can be argued that the difference in approach at 65 is discriminatory on grounds of age in that it makes assumptions about earning capacity on the basis of age. It is however possible that these may be regarded as justifiable, particularly as it is accepted that if a cogent reason exists for suggesting earning capacity to be higher, then this can be considered. This, and the procedural requirements of the PIBR on a review for the matter to be referred to an SMP with an appeal right to a medical appeal board, means that any pensioner for whom the assumption is inappropriate can raise it with the SMP/PMAB.

### **32. What is meant by “cogent reasons”?**

Home Office Circular 46/2004 indicates that the default position should apply in the absence of “cogent reasons”.

There is no definition of “cogent reasons” nor any case law of which we are aware indicating what might amount to such reasons.

Given the context we do not really expect there to be any case law on the point. In short HOC 46/2004 sets out guidance from the Home Office as to the approach that should be adopted in relation to reviews of degree of disablement at an officer's compulsory retirement age and at state retirement age. In both cases the guidance is that the relevant approach should be adopted in the absence of cogent reasons for not doing so.

This is best understood as an attempt by the Home Office to give guidance while avoiding fettering the power of an SMP to make his or her own decision on the facts of the case in question. This is necessary as the PIBR provides that degree of disablement is to be decided by an SMP (or on appeal by a PMAB). The idea is that the general approach should apply unless the pensioner can produce a sustainable argument why it should not. A possible example might be a case in which a pensioner was able to argue that if s/he had not received the injury then his/her earning capacity at compulsory retirement age would have been well above national average earnings but as a result of the injury earning capacity had been significantly reduced. Similarly, there may be cases in which members are able to argue that had they not received the injury they would have been able to work beyond state retirement age, but as a result of the injury they are no longer able to do so. There is no guarantee in either case that these arguments will be successful.

## **Section 6: appeals to police medical appeal boards**

### **33. What are the time limits for an appeal?**

An appeal to the PMAB must be notified to the police authority within 28 days of the member receiving the decision of the SMP. The second stage is to notify the police authority of the grounds for appeal must be submitted within a further 28 days. Both the initial notification and the grounds can be given in short letter form, or by completion of the appropriate forms provided by the Board or the police authority.

### **34. Is there any risk in appealing?**

There are two main risks to be aware of:

- (i) the PMAB can vary any part of the decision that was referred to the SMP, not just the part appealed against, and may make a less favourable decision; and
- (ii) while the general rule is that the police authority bears the costs of the appeal, the PMAB does have the power to order the appellant to pay if there is non-compliance with time limits (including withdrawals of the appeal) or if the appeal is considered to be frivolous or vexatious.

On the first risk, we interpret the regulations as meaning:

- (a) that on a review, the only question the PMAB can deal with is degree of disablement;
- (b) that if in the relevant report the SMP dealt with the questions of whether disablement was the result of an injury received in the execution of duty and degree of disablement the PMAB can deal with both questions, even if the member only appeals degree of disablement; and
- (c) that if the relevant report also dealt with permanent disablement, and that had not already been determined in an earlier report, the PMAB can deal with that as well.

NB we have seen cases where:

- (i) a member has appealed against a band 2 degree of disablement and has been reduced to band 1; and
- (ii) a member has appealed against degree of disablement and lost the injury award altogether.

There is also the risk that if a PMAB makes a comment that the member is in their view no longer disabled then the police authority may consider using its powers under regulation K1 Police Pensions Regulations 1987 (applicable up to the point at which the member would have had 25 years service) or regulation 51 Police Pensions regulations 2006 (applicable until the member is 55). In short this means that the member is invited to rejoin the force and loses their ill health pension if s/he declines to do so.

**35. What guidance should be given to members contemplating an appeal?**

Clearly each case will turn on its own facts and the medical position of the member concerned. It is however important that members are aware:

- (i) that almost all medical appeals are to a significant extent unpredictable. The matters under consideration tend to involve causation and prognosis, which are issues upon which doctors can and do disagree. The PIBR deal with this by elevating the decision of the SMP (or if the officer appeals, the Board) to finality; and
- (ii) of the risks of an appeal. These depend on the circumstances – see the previous question.