

APPENDIX 6

EXAMPLE PROCESS FOR REVIEWING DEGREE OF DISABLEMENT

The process for reviewing the degree of disablement will vary from Force to Force and the Selected Medical Practitioner is entitled to set his/her own process in each individual case.

Before providing an overview of possible stages within the process it is important to recognise that because the SMP sets his/her own process there will be several different methodologies.

Two possible methodologies, which appear to comply with case law have distinct differences but should arrive at the same banding.

Method 1 is the recognised way of undertaking an assessment. Initially assess the uninjured earnings, which includes all conditions apart from the duty injury. Secondly an assessment is made of the injured potential earnings, which includes all injuries/conditions. A comparison is made between the two figures to assess any reduction to give the degree of disablement.

Method 2 would again require an assessment of the uninjured earnings, which includes all conditions apart from the duty injury. Secondly an assessment is made of the potential earnings just with the duty injury and then a comparison is made between the two figures to assess whether and by how much there has been a reduction to give the degree of disablement.

A brief overview of the possible stages within the process is as follows:

1. The Human Resource Department of the Force (Departments with this responsibility will vary from Force to Force) will contact the pensioner at the relevant time when a case may be due for review.
2. A questionnaire will be forwarded to the pensioner (see appendix 2)

3. At this stage it will assist the process for a consent form to be forwarded for completion allowing access to the Occupational Health records and the GP records. Refusal to allow access may lead to the SMP making a determination on the facts available, which may reduce the award or if the request for review is from the ex officer may lead to the case being struck out for consideration. (see appendix 5 –HANLON)
4. Regulation 33 of the Police (Injury Benefit) Regulations 2006 states - ‘If a question is referred to a medical authority under regulations 30,31 or 32 (*ie reference to medical questions, appeal to PMAB and reconsiderations*) and the person concerned wilfully or negligently fails to submit himself to such medical examination or to attend such interviews as the medical authority may consider necessary in order to enable him to make a decision, then –
 - a. If the question arises other than on appeal to a board of medical referees, the police authority (*now Police Pensions Authority*) may make a determination on such evidence and medical advice as they in their discretion think necessary
 - b. If the question arises on an appeal to a board of medical referees the appeal shall be deemed to be withdrawn.
5. A file/report will be prepared by the Force for forwarding to the SMP, which may comment on any relevant changes since the previous assessment (see appendix 5 – LAWS)
6. Assuming there has been a change warranting a review the SMP will consider the case and will apply his/her own process.
7. However, he/she will not review the case from scratch but will take into account the findings from the previous review. (see appendix 5 – TURNER)
An SMP cannot “start from scratch” when considering whether the degree of disablement had altered.
8. What this meant in TURNER, and in the later Court of Appeal case of LAWS, in which the same conclusion was reached, was that the SMP was not entitled to re-open clinical judgments, e.g. as to causation or apportionment, made in earlier decisions under the Regulations.

The decision in SIMPSON arguably extends this principle to preclude the SMP from “starting from scratch” in the sense of conducting a current assessment of the officer’s injured earning capacity as compared with his uninjured earning capacity.

9. It is best practice, wherever possible for the SMP to conduct a medical examination. In TURNER it stated that it is clearly fair both for the police force and for the community that someone who starts out on a pension on the basis of a certain medical condition should not continue to draw a pension, or any kind of benefit, which is no longer justified by reason of some improvement in his condition, or, of course, the reverse.”
10. What he/she should be assessing, though, is not “what is the pensioner’s current condition?” but, rather, “how, if at all, has the pensioners degree of disablement consequent upon the duty injury changed from the time of the previous determination?”
11. Thus, the SMP must consider:
 - a. whether there has been any alteration, be it improvement or deterioration, in the condition consequent upon the injury on duty; and
 - b. whether there has been any alteration, be it improvement or deterioration, in the underlying health, fitness or condition of the former officer.
12. The SMP must then determine whether such alterations as he/she may find to have occurred have led to an alteration (from the time of the previous determination):
 - a. in the jobs the pensioner would have had the skills to perform if he/she had not been injured; or
 - b. in the jobs the officer is in fact able to do.
13. He/she should also consider whether by the acquisition of new skills the former officer’s earning capacity has altered.

14. If there has been alteration in the jobs that the officer would have been able to do but for the injury, when compared with what he/she would have been able to do but for the injury at the time of the earlier review, or in the jobs that he/she is now able to do, when compared with what he/she was able to do at the time of the earlier review, the SMP must consider whether that alteration is substantial (more than minimal or trivial).
15. If the SMP determines having followed this process that there has been a substantial alteration in the degree of disablement due to the duty injury, he/she should then consider what the degree of disablement now is.
16. If the SMP determines that there has been a substantial alteration in the degree of disablement, then it would be appropriate to conduct an accurate assessment, bearing in mind always that the SMP cannot come to new decisions in relation to issues of causation and/or apportionment that have previously been determined, he can only take account of the changes since the previous review.
17. In determining what the former officer would have been capable of earning but for the duty injury it is essential that the officer's individual circumstances are considered.
18. When assessing uninjured earnings the use of generic comparators should be avoided unless supported by other information. The Annual Survey of Hours and Earnings (ASHE) provides salaries for the general working population and table 14.2a provides salaries for specific jobs. It is always recommended to use the median salary levels for full-time all full-time workers and age/sex factors should not be taken into account. (see - www.ons.gov.uk/ Once site opened search *ASHE 2013 table 14 - Occupation*. Select table from list and then once open select *full-time*)
19. ASHE also provides all-encompassing salary levels for all workers at the median level in all full-time work. However, where possible it is recommended to identify specific work suitable to the retired officer's skills, competencies and health.

20. Prior to reaching the compulsory retirement age for the former officers rank the updated police salary may be used as a starting point for the uninjured salary.
21. However, if the former officer could not be a police officer anyway because of other medical conditions or through other circumstances then the use of an ASHE figure for specific work may be a more appropriate comparator. (i.e. dismissal from the Force)
22. Each case must be considered individually and on its merits by the SMP.
23. If, though, the officer has particular skills which would have enabled a higher earning capacity, for example he/she has a commercial pilot's license and would have worked as a commercial pilot, or even he/she was a relatively senior ranking officer and would have expected to undertake management level work, then this must be taken into account.
24. It is necessary to make two assessments. Firstly an assessment of the uninjured earnings potential, which discounts the duty injury and secondly the injured earnings potential, which includes the duty injury.
25. Reviews should be conducted as indicated in SIMPSON. The assessment should be made of whether the uninjured earning capacity has substantially altered and whether the officer's degree of disablement consequent upon the duty injury has substantially altered, both from the time of the previous determination.
26. If a subsequent deterioration in the officer's general health or fitness means that his uninjured earning capacity but for the injury would have been reduced in any event, then that should be taken into account when determining the degree of disablement.
27. Thus, to give an example, if an officer were to have developed advanced Parkinson's disease since the last review, such that he/she was unable to work by reason of the symptoms of that disease alone, then the uninjured earning capacity should be nil. Therefore the injured earning capacity is also nil.

28. Alternatively, if an officer were to have become generally less fit by reason of advancing age, such that he/she was no longer able to undertake a physically demanding job, or no longer able to work full time, then the uninjured earning capacity would be reduced accordingly.
29. To do otherwise would fail to have regard to the wording of regulation 7(5), which sets out a test of causation clearly designed to put the injured officer in the position he would have been in had it not been for the duty injury:
- “(5) Where it is necessary to determine the degree of a person's disablement it shall be determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of a police force ...”
30. If an officer would be unable to work by reason of Parkinson's disease in any event, then his earning capacity has not been affected as a result of a duty knee injury suffered in the execution of duty and therefore the degree of disablement would be within the slight banding. (zero percent)reasonably
31. If the SMP looks at a case and determines that there are no grounds to show any changes from the previous review he may conclude that there is no requirement to continue the process and the pensioner will be advised accordingly.
32. If the pensioner is called for a review he will normally be allowed to have a person present in support but that person will not normally be there to answer questions.
33. Any reasonable travel expenses will normally be repaid upon application. For persons living abroad this would reasonably only be within the UK.
34. It is important to note that the SMP sets his/her own process and has his/her own case management powers (see 4.3 in procedural guidance). If he/she feels it necessary to obtain full GP records or to refer a former officer for a specialist opinion that will fall within his/her powers.

Any refusal to agree may either lead to the SMP making a determination on the facts available, with a presumption that there are reasons for refusing, or ceasing the review.

35. It should be noted that this is not a labour market assessment of whether somebody would actually pay a person to do what he or she is capable of doing, whether or not in competition with other workers.
36. The task in assessing the potential earning capacity is to assess what the person is capable of doing and thus capable of earning. A similar assessment is also undertaken to assess the uninjured injury figure. (i.e. If he/she had not been injured in the execution of duties what potentially could he/she be earning)
37. In order to assess the degree of disablement the SMP will need to consider by reference to the person's background, skills and qualifications what kind of employment he/she could potentially undertake.
38. It should also be noted that if apportionment was considered by the SMP at the previous assessment then it can be considered again.
39. The procedural guidance explains more fully why a comparison must be made between the uninjured salary and the potential salary including the index injury.
40. In summary the Selected Medical Practitioner will set his/her own process but may require information from the Force to calculate the degree of disablement. He/she may also require additional information by way of GP records or specialists opinions as part of his case management powers.
41. In all cases of a review there must be a change warranting a review before the degree of disablement is calculated. If there is no valid change a review cannot be undertaken.

ALL CASES ARE DEALT WITH INDIVIDUALLY AND THE SMP MUST DECIDE HOW BEST TO UNDERTAKE ASSESSMENTS.

THE FOLLOWING ARE POSSIBLE METHODOLOGIES FOR THE ASSESMENT

Example 1

Under 60 years (Under CRA) with no other conditions and no loss of competencies.
Uninjured comparator is the updated police salary and the injured comparator including the index condition is usually as assessed by HR and considered appropriate by the SMP. A direct % reduction gives the degree of disablement.

Example 2

60 years or over with no other conditions and no loss of competencies.

Note now over the compulsory retirement age for Police Officers and therefore the police salary can never be the uninjured comparator. The uninjured comparator could be taken from ASHE table 14.2a, which lists specific salaries for specific work at the median rate. The injured potential work comparator includes the index condition. A direct % reduction gives the degree of disablement.

Note there could also be increased competencies, which may account for a higher uninjured and injured comparators.

Example 3

Under CRA with no other conditions apart from those considered at the previous assessment and apportioned.

The uninjured comparator is the updated police salary and the injured comparator including the index condition is as assessed by the HR and considered as appropriate by the SMP. A direct % reduction gives a degree of disablement prior to apportionment. Assuming that figure is 40% a reduction of 50% through apportionment would give a degree of disablement as 20%.

Example 4

Over CRA with no other conditions apart from those considered at the previous assessment and apportioned.

The uninjured comparator is calculated as in example 2. The injured comparator before apportionment includes the index condition and other conditions previously considered for apportionment. A direct % reduction gives the degree of disablement. Assuming that figure is 40% a reduction of 50% through apportionment would give a degree of disablement as 20%. Also it should be noted that the uninjured comparator could be higher than, for example, if competencies have improved significantly.

Example 5

Under CRA but now has other conditions which effect earnings.

In this case the uninjured comparator excluding the index condition is assessed to include all conditions apart from the duty injury. The injured comparator then includes all conditions including the duty injury. The uninjured earnings comparator could be taken from table 14.2a from ASHE and supported by evidence of other specific work. This assessment would include all conditions and circumstances apart from the duty injury. A reduction between the uninjured figure and the injured earnings potential gives the degree of disablement. Apportionment could then be considered if considered at the previous assessment.

Example 6

Over CRA but now has other conditions, which affect earnings loss.

These may be age related, any other medical condition, or substantial reduction in competency levels. As example 5 - the uninjured salary could be taken from ASHE table 14.2a at the median rate for full-time workers but adjusted to take account of perhaps the need to work reduced hours because of other conditions. It is recommended to support any ASHE figures with salary levels from other work (ie police civilian jobs or other advertised jobs). The comparator to be used depends on the individual circumstances in individual cases.

Example 7

Refusal to be medically examined (see paragraph 4 above)

If a retired officer wilfully or negligently refuses to undertake part of the process required by the SMP to enable him to answer the medical questions required of him in his determination the SMP can either make a determination on the facts available if he feels that he has sufficient evidence to make a determination or more likely the SMP is entitled to inform the PPA that he was unable to make a determination because of the wilful or negligent responses from the retired officer. This could be in relation to the release of full GP records, refusal to be medically examined or refusal to be seen by a specialist as part of the necessary process.

In such circumstances the PPA can then make a determination on the facts of the case and any advice from the SMP in relation to the questions to which he had been asked to consider. Because the PPA would then be making a determination rather than the SMP there will be no right of appeal to the PMAB and any appeal would need to be through the Courts.

It should be noted that the SMP should be reasonable in taking this action and should give due cognisance to any explanations for any apparent refusals before informing the PPA of any refusal and giving his reasons.

USEFUL REFERENCES FOR COMPARATORS

- a. Updated police salaries taking into account that competency related threshold payments can only be included if the officer had been receiving at the point of retirement.
- b. ASHE earnings statistics for all full-time workers at the median level at the basic rate excluding overtime. Note these are generic comparators for all ages rather than specific jobs.
- c. ASHE figures...(Annual Survey of Hours and Earnings)
Table 14.2a for full time employees undertaking specific work at median level excluding overtime. (Note weekly level must be multiplied by 52.143 to obtain annual salary.)
All information for ASHE available through internet search from the Office of National Statistics– <http://www.ons.gov.uk> (see para 18 above)
- d. Police Earnings Assessment Matrix prepared by Grantwood Consulting. (copies available through West Midlands Police) Note these figures are comparators based on generic skills so should be supported by other evidence.
- e. Specific Occupations.... Database of jobs and salary levels including skills, abilities and competency levels for the jobs should be considered.
- f. Actual work being undertaken
- g. Database of skills, abilities and competencies of generic police officers in particular roles for use in assessing other potential earnings.
- h. Individual personnel files may assist in providing information to assist in assessments of competencies etc.