FREEDOM OF INFORMATION REQUEST

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FOI Reference number: FOI 03/2024

Date: 21 February 2024

Request:

Determining the degree of a pension's disablement within the PIBR 2006 for both ill health/ retrospective IOD awards.

When it is necessary to determine the above could you please explain in detail how the NIPB calculate the following:

(a) The uninjured earnings capacity of the applicant
(b) The injured earning capacity of the applicant
(c) All other relevant information relating to the above subject.

Answer:

The Northern Ireland Policing Board (**the Board**) does not calculate the uninjured and injured earning capacity of the applicant, rather the Board employs Selected Medical Practitioners (**SMP**) whose role is to consider the statutory questions set out in the relevant legislation i.e. *Police Pension Regulations (Northern Ireland) 2015* and the *PSNI and PSNI Reserve (Injury Benefit) Regulations 2006*. As part of their assessment SMPs make use of a document entitled '*Joint Guidance for Medical Practitioners on Injury on Duty Awards'* which is attached for your convenience. Further, any calculations in relation to Ill Health Retirement and Injury on Duty Awards are carried out by PSNI Pensions Branch.

If you have queries regarding this request or the decision, please contact the Board quoting the reference number above. If you are unhappy with the service you have received and wish to make a complaint or request a review you should contact the Board's Chief Executive -

Via Email: foi@nipolicingboard.org.uk

Or in writing at the following address:

Northern Ireland Policing Board
James House
Block D
2 – 4 Cromac Avenue
The Gasworks
Belfast
BT7 2JA

You should contact the Board within 40 working days of this response.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner. Generally, the Information Commissioner's Office cannot investigate or make a decision on a case unless you have exhausted the complaints procedure provided by the Board. The Information Commissioner can be contacted at the following web link –

www.ico.org.uk/foicomplaints

or in writing at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Telephone: - 0303 1231114
Email: - ni@ico.org.uk

Please be advised that Policing Board replies under Freedom of Information may be released into the public domain via our website @ www.nipolicingboard.org.uk.

Personal details in respect of your request have, where applicable, been removed to protect confidentiality.

Northern Ireland Policing Board

Department of Justice
www.dojni.gov.uk

JOINT GUIDANCE
for
MEDICAL PRACTITIONERS
on
INJURY ON DUTY AWARDS

Version 2 - September 2016

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CONTENTS

1. INTRODUCTION

The purpose of this guidance is to provide Selected Medical Practitioners and Independent Medical Referees with clear policy guidance on how to carry out assessments for Injury on Duty Awards under the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006 (the 2006 Regulations).

The 2006 Regulations contain a number of terms which are not defined within the regulations and could be interpreted or applied in a range of ways. In order to ensure equality of treatment and a consistent approach, medical practitioners are recommended to use this guidance and the definitions provided herein (based on policy and case law).

Please note however as this document does not have statutory underpinning and neither the Northern Ireland Policing Board (NIPB) nor the Department of Justice (DOJ) have the authority to give a binding interpretation on a point of law.

The courts are the competent jurisdiction for providing an authoritative ruling on terms contained within legislation; therefore this guidance should only be used until such time as a ruling is given on the correct interpretation of any provision within the 2006 Regulations. In such a case the guidance will be revised accordingly.

This is the second version of this guidance and it is a living document which will be updated on a regular basis to reflect current legislation, policies, procedures and guidance. A copy of this guidance will be published on the NIPB's website.

Alternative Formats

This document may also be made available upon request in alternative formats or languages. Requests for alternative formats should be made to NIPB Police Administration Branch.

2. ROLES AND RESPONSIBILITIES

2.1 The Northern Ireland Policing Board

The Northern Ireland Policing Board ("the NIPB") was established on 4 November 2001, under the Police (Northern Ireland) Act 2000 (the 2000 Act). It is the role of the NIPB to secure the delivery of an effective, efficient and impartial policing service for the entire community in Northern Ireland and to hold the Chief Constable to account for the exercise of his functions and of the police service in an open and transparent manner.

In accordance with the Police Pension Regulations[1] and the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006 the NIPB has a statutory responsibility for administering all applications made by officers and former officers for Ill-Health Retirement (IHR) and/or an Injury on Duty Award (IOD).

2.2 NIPB Police Administration Branch

The NIPB Police Administration Branch of the Northern Ireland Policing Board (the NIPB) is responsible for the management of all applications from current and former police officers, on behalf of the NIPB. It is the role of the Branch to ensure that all applications and reassessments are conducted in a professional and timely manner.

The NIPB's Resources Committee is responsible for determining, on behalf of the NIPB, whether a pension or award will be granted following receipt of the Selected Medical Practitioner report and certificate. For business purposes and to ensure applications are dealt with expeditiously and accurately, this authority is delegated to nominated Branch staff.

2.3 Police Service of Northern Ireland

The Royal Ulster Constabulary (RUC) became the Police Service of Northern Ireland (PSNI) under the 2000 Act.

The PSNI hold records relating to an officer/former officer's service, including sickness and injury on duty reports, which are pertinent to an officer/former officer's claim. With the permission of the claimant copies of this information are forwarded to NIPB Police Administration Branch for consideration as part of an application for IHR and/or an IOD Award.

PSNI Occupational Health and Well-being (OHW) provide any confidential medical information held in respect of an officer/former officer. In cases of serving officers they may also make a referral to the NIPB for consideration of IHR and (if applicable) an IOD Award.

[1] The Royal Ulster Constabulary Pensions Regulations 1988, the Police Pension (NI) Regulations 2009 and the Police Pension Regulations (NI) 2015.

2.4 Selected Medical Practitioner

The NIPB's Selected Medical Practitioner (SMP) conducts all medical assessments in respect of applications received. The SMP will set out in a report and certificate their decision on the claimant's application, against the relevant criteria (see Sections 3 and 11).

2.5 Department of Justice

The Department of Justice (DOJ) is responsible for the appeal process and appointing an Independent Medical Referee (IMR) to consider the appeal. The DOJ will provide the appellant with an appointment for each IMR who will assess the appellant. The DOJ will forward a copy of the IMR decision to the appellant.

The DOJ is also responsible for Appeal Tribunals where the claimant is dissatisfied with the NIPB's decision on a pension or award.

2.6 Independent Medical Referee (IMR)

The IMR will carry out an assessment of the appellant, in the same terms as the SMP, and set out their decision in a written statement for the DOJ. If the IMR disagrees with the SMP they will set out their decision in a fresh report and certificate.

3. PSNI AND PSNI RESERVE (INJURY BENEFIT) REGULATIONS 2006

Although as detailed in Section 2 medical practitioners may be asked to make a determination on both Ill Health Retirement (IHR) and/or an Injury on Duty (IOD) Award in the one application, this guidance will focus on the IOD Award process only. Separate guidance for medical practitioners is available on the process for IHR applications.

The PSNI and PSNI Reserve (Injury Benefit) Regulations 2006 ("the 2006 Regulations") set out the criteria and process for consideration of an IOD Award. A new Injury on Duty Scheme is due to be consulted on by the DOJ in the coming months, with a view to implementation in the next 12 months. Separate guidance on the new scheme will then be produced by the NIPB.

3.1 Police Officer's Injury Award (IOD Award) – Regulation 10

In accordance with Regulation 10 an IOD Award may be granted to a person who ceases or has ceased to be a police officer and is permanently disabled as a result of an injury received without his own default in the execution of his duty.

Each phrase in this regulation will be explained further below:

3.1.1 Ceases or has ceased to be a police officer

In order to apply for an IOD Award a serving officer must be in the process of consideration for retirement on ill-health grounds; have served notice of their intention to retire or given notice of resignation.

In the case of a serving officer under consideration for IHR, they must be determined to be permanently disabled from performing the ordinary duties of a police officer, before consideration can then be given to their entitlement to an IOD Award (under Regulation 29(2) (c) and (d)). If the serving officer is not determined to be permanently disabled they will not qualify for either IHR or an IOD Award.

For former officers who have already ceased to serve (either under the RUC or the PSNI), an application can be made retrospectively at any time after they leave the police service.

3.1.2 Police Officer

Police officer is defined in Schedule 1 of the 2006 Regulations as a constable within the PSNI or a PSNI trainee (section 36(3) of the 2000 Act).

3.1.3 Permanently disabled

An applicant must be disabled at the time of the assessment and their disablement must be likely to be permanent (on the balance of probabilities) – Regulation 6(1).

Disablement is not the ordinary meaning of the word and is defined within Regulation 6(4) as, 'inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a police officer'. Infirmity is further defined in Regulation 6(8) as 'a disease, injury or medical condition, and includes a mental disorder, injury or condition'.

3.1.4 Ordinary duties of a police officer
The primary duties of a police service are the protection of life and property, the preservation of peace, and prevention and detection of crime.

In furtherance of these objectives a police officer can expect to be involved in a wide range of duties in connection with patrols, security (including surveillance), crime investigation, traffic control, communications, community relations work etc.

For your information, a police officer is expected to perform the following activities:

- Ability to sit for reasonable periods, to write, read, use the telephone and to use (or learn to use) IT
- Ability to run, walk reasonable distances, and stand for reasonable periods
- Ability to make decisions and report situations to others
- Ability to evaluate information and to record details
- Ability to exercise reasonable physical force in restraint and retention in custody
- Ability to understand, retain and explain facts and procedures

With these capabilities, the police officer would be expected to be able to perform the following duties:

- Managing processes and resources and using IT
- Patrol/supervising public order
- Incident management, such as traffic and traffic accident management
- Dealing with crime such as scene of crime work, interviewing, searching and investigating offences
- Arrest and restrain
- Dealing with procedures such as prosecution procedures, managing case papers and giving evidence in court

Every post to which a police officer may be assigned is not equally physically or mentally stressful. However, the majority of police officers are attached to operational divisions which are responsible for Law and Order within their particular areas. Work patterns of front line police officers can vary with some officers working 10 or 12 hour shift patterns, including working night duty two nights per week. However, the majority of police officers work shift patterns of 8 hours. Shift patterns can, when necessary, be extended to meet particular operational requirements.

Police Officers are required to carry loaded firearms when performing operational duties in order that they can defend themselves in the event of terrorist attacks. Weapons and ammunition are on personal issue and are retained by the police officer for personal protection at all times.

There are a limited number of specialised and administrative posts in the PSNI but it is the considered view of the Chief Constable that police officers must be capable of undertaking the full range of duties in their rank. This mobility is necessary not only in the interest of the efficiency of the PSNI but also for the training and career development of the individuals. There are few exceptions to this.

See the *Stunt, Kellam, and Staritt/Cartwright* judgments in **Annex A** for further information.

3.1.5 Without his own default
The injury is not due to the default of an officer/former officer unless the injury is wholly or mainly due to their own serious and culpable negligence or misconduct – Regulation 5(4).

3.1.6 Injury received in the execution of duty
An injury is treated as received in the execution of duty:

- where the officer/former officer received the injury while on duty or while on a journey necessary to enable him to report for duty or return home after duty; or
- they would not have received the injury had (s)he not been known to be an officer; or
- the NIPB determines one of the above conditions may be satisfied and the injury should be treated as such – Regulation 5(2).

The injury must also have caused or substantially contributed to the officer/former officer's disablement – Regulation 7. You should exercise your judgment as to whether the injury substantially contributed to the applicant's disablement, however, it is suggested the contribution should be a significant or material cause, but not necessarily a main cause, of the applicant's disablement.

3.1.7 Reference of medical questions
In order for the NIPB to determine whether the criteria for an IOD Award is met, it must refer the following four questions to the Selected Medical Practitioner to decide (Regulation 29(2)):

a) whether the claimant is disabled;
b) whether the disablement is likely to be permanent;

if ***yes*** to the first two questions then –

c) whether the disablement is the result of an injury received in the execution of duty; and
d) the degree of the claimant's disablement.

Where the applicant has already or is being considered for Ill Health Retirement the decision will be taken on questions a) and b) under separate regulations – the relevant Police Pension Regulations. **In the case of a decision under the RUC Pensions Regulations 1988 this is <u>binding</u> for the purposes of your consideration of the applicant's eligibility for an IOD Award. You must therefore go on to assess questions c) and d) assuming the applicant is permanently disabled.**

3.1.8 Likely to be permanent

For the purposes of your assessment an applicant's disablement is considered likely to be permanent if you determine the disablement will last for the remainder of the applicant's life. Where the applicant has not exhausted all treatment and the issue of permanency is therefore unclear, please include within your opinion the likelihood of permanency if the additional treatment were to be obtained.

3.1.9 Normal appropriate medical treatment

For the purposes of determining if the claimant's disablement is likely to be permanent you should assume that the officer/former officer is receiving normal appropriate medical treatment for the disablement. This does not include medical treatment that the NIPB determines it is reasonable for the officer/former officer to refuse – Regulation 6(3).

3.1.10 Degree of loss of earning capacity

In order to ensure there is no confusion between the different uses of 'disablement' under the regulations the degree of disablement will be referred to as the degree of loss of earning capacity in this document.

Where you are determining the degree of loss of earning capacity it must be assessed on the degree to which the officer/former officer's earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a police officer – Regulation 6(5). It is not simply a measure of how disabled the officer is (i.e. the extent to which they can partially perform the duties of a police officer).

3.2 Total Disablement – Regulation 11

A claimant will be totally disabled where they are unable to earn in any capacity i.e. they are incapable by reason of the disablement in question of earning any money in any employment – Regulation 6(6).

As with Regulation 10 Awards, if the NIPB is considering whether a claimant is totally disabled they must refer four questions to the Selected Medical Practitioner to decide (Regulation 29(3)), as follows:

a) whether the claimant is totally disabled;
b) whether the total 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 date on which the claimant became totally disabled.

Where you determine a claimant's degree of disablement as **Very Severe** in respect of a Regulation 10 award, you will be asked to go on to consider the above four questions.

An applicant must be totally disabled at the time of the assessment and their total disablement must be likely to be permanent (on the balance of probabilities) – Regulation 6(2).

If an officer/former officer is receiving treatment as an in-patient at a hospital, as a result of a duty injury, you must deem them as totally disabled – Regulations 6(5).

Where you determine a claimant is totally disabled the certificate should indicate their banding as **Very Severe disablement** (discussed further in Section 4).

3.3 Timescales for assessment/reassessment

To avoid unnecessary delays in the process the NIPB will apply the following key criteria:-

a) An applicant will be provided with an appointment (via NIPB) for their assessment preferably within 8 weeks, but no later than 12 weeks, of selection of the SMP. Where this is not possible the NIPB will advise the applicant accordingly.
b) All assessments should be completed i.e report and (if applicable) certificate on the day of the appointment. Exceptions to this may occur where you have requested additional GP/Specialist report(s) not included in the case referral supplied by the NIPB. Other exceptions may be where 'home visits' or medical assessments at other facilities have to be arranged or additional points of clarification are raised. If additional information is required, you should complete an interim report on the day of the appointment. Further time will be scheduled for

you to complete the report and certificate (upon receipt of the requested information) within 6 weeks but no more than 12 weeks thereafter.

3.4 Referral to a Third Party

If you consider it is necessary you may seek the opinion of a third party (who may or may not be treating the claimant) or require a report from a GP or Specialist who is treating the claimant. The NIPB's agreement should be sought before making any referral for additional tests or specialist reports, for which consent has not already been given. The request will be processed by the NIPB's staff.

3.5 Conflict of Interest

Where it comes to your attention that you have treated or assessed an applicant within the previous 2 years please notify the NIPB as soon as possible as this may give rise to a conflict of interest. A different SMP will then be appointed to carry out the assessment, unless no one else is available. Please see the SMP Conflict of Interest Policy for further information.

4. DEGREE OF DISABLEMENT ASSESSMENT METHOD

When assessing the effect of the duty/qualifying injury on the officer/former officer's earning capacity you are not being asked to measure how disabled the officer/former officer is i.e. the extent to which they can partially perform the ordinary duties of an officer.

You must instead make a judgment on the extent to which the officer/former officer's disablement affects their earning capacity i.e. the consequences of the duty/qualifying injury for the officer/former officer's capacity to work in any employment. In order to do so, you should compare the situation with the injury present to a notional situation where it has not occurred. The loss of earning capacity will then be the difference between these two situations.

You should not confuse loss of earning capacity (i.e. the ability to work) with loss of earnings. In making your judgement there should be no calculations and no use of ASHE or similar salary information. The focus should be on the work duties the claimant is able to perform both with and without their injury.

A case referral will be supplied by NIPB Police Administration Branch, along with the application and supporting evidence, providing an overview of the injuries/conditions to be assessed and any incidents whereby the applicant was injured during service (from the service records provided by PSNI). However, you should not rely on the case referral only to make your decision but rather you should consider all the documents provided.

Where you identify that further information is required in order to come to a decision on the officer/former officer's condition, such as GP/Specialist notes or records, these should be sought via NIPB Police Administration Branch.

As part of the assessment you should take into account the officer/former officer's medical condition and the level of their skill/experience in order to determine which of the bandings (below) best describes the officer/former officer's ability to work.

You should set out in your report and certificate whether the officer/former officer's loss of earning capacity is:

- **Slight disablement**;
- **Minor disablement**;
- **Major disablement**; or
- **Very Severe disablement**.

A description of each banding is provided in the table within Schedule 3 of the 2006 Regulations (replicated at **Annex B**).

As set out in Section 3.2 above if the officer/former officer is being treated as an in-patient at a hospital at the time of assessment, as a result of a duty/qualifying injury, they must be recorded as Very Severe disablement on the report and certificate. This will only apply where the officer/former officer is totally disabled, i.e. incapable as a result of the disablement of earning any money in any employment, and the total disablement is likely to be permanent.

If during your assessment you form the opinion that an injury/condition (which has not been stated on the application) is present which may be impacting the earning capacity of the applicant, this should be stated clearly in your report. The additional injury/condition should also be considered under the four questions to determine if it meets the criteria for an IOD Award. This will ensure that a separate assessment for the additional injury/condition is not required at a future date.

5. REDUCTION OF AWARD IN CASE OF DEFAULT – REGULATION 29(4)

Where the NIPB is considering reducing an award in cases of default it will refer to you the question whether the claimant has brought about or substantially contributed to their disablement by their own default.

As stated at 3.1.5 above default only applies where the claimant's disablement is wholly or mainly due to his own serious and culpable negligence or misconduct.

The word "substantial" is not defined in the regulations and within case law interpretation is ambiguous. There are two approaches in case law that it either means not insubstantial or it means significant or large.

You should exercise your judgment as to whether the claimant substantially contributed to their disablement, however, it is suggested the latter of the meanings set out above should be used i.e. the contribution is a significant or material cause, but not necessarily a main cause, of the claimant's disablement.

6. REASSESSMENT OF AN INJURY ON DUTY AWARD – REGULATION 35(1)

Where you are asked to carry out a reassessment, in line with Regulation 35(1) of the 2006 Regulations, of the former officer's IOD Award you must consider only the degree of the claimant's disablement (Regulation 29(d)) i.e. whether the loss of earning capacity has substantially altered.

There should not be any consideration of the basis on which the award was originally granted, including whether the duty injury caused or substantially contributed to the former officer's disablement, as this would be revisiting causation.

As each SMP or IMR report is final (Regulations 29(5) and 30(3) respectively, subject to reconsideration under Regulation 31) the decision of a previous reassessment should be taken as a given.

A point of importance is the meaning of 'degree of disablement'. This is not the notion of disablement, explained in section 3.1.3 as the inability to perform the ordinary duties of a police officer. Rather it is the degree of loss of earning capacity set out in 3.1.10.

Therefore, whilst you will assess whether the former officer's medical condition has changed this is not the only factor which can alter earning capacity. For example, a new job opportunity may arise which was not previously available to the former officer and which they are capable of undertaking without any change in their medical condition having taken place.

Only if there has been an alteration in the degree of disablement are you permitted to go on to assess whether the alteration is substantial. In doing so you will first consider the former officer's earning capacity as at the last assessment and compare it to the former officer's current earning capacity. The latter will require you to make a judgment on how the former officer's earning capacity is currently affected by the duty/qualifying injury.

You should only produce a certificate to revise the officer/former officer's banding where you have determined there has been a substantial alteration in their loss of earning capacity. Otherwise your report should state the banding remains unchanged.

A substantial alteration is taken to be a movement in the bandings e.g. from Minor disablement to Major disablement. The alteration may result in an upward or downward movement in the bandings and a resultant increase or decrease in the former officer's IOD Award payment.

As with the first assessment of an application, on reassessment you should provide an opinion on the interval to be applied for the next reassessment.

7. NON WORK RELATED FACTORS

Non-related factors such as pre-existing injuries/conditions, or those which develop subsequent to the granting of an IOD Award, can have a varying impact on a former officer's earning capacity over time. On future reassessment non-related factors may become a more or less dominant factor in a former officer's ability to work.

In line with relevant case law the following practice should be adopted in assessing a former officer's earning capacity:

- Where two distinct conditions have separately caused some degree of loss of earning capacity, one a duty injury and the other a non-duty injury, it is the effect of the former injury alone which you should considered when assessing the former officer's earning capacity;
- If a former officer's medical condition is exacerbated by a subsequent non-duty injury it is only the effect of the duty injury on the former officer's earning capacity that should be taken into account on reassessment;
- An underlying condition which of itself had not, or did not, cause a loss of earning capacity should not be taken into account. The former officer's loss of earning capacity should be attributed wholly to the duty injury which has directly caused the loss of earning capacity;
- By contrast if an underlying condition had to some extent caused a loss of earning capacity prior to the duty injury occurring, the Medical Practitioner should identify the portion of the total loss that relates to the duty injury alone;
- In cases of one injury with multiple causes, where there are duty and non-duty contributory factors, so long as the duty injury has been determined to have substantially contributed to the former officer's disablement, the impact of the injury on the former officer's earning capacity should be wholly attributed to the duty factor(s).

As outlined in Section 6 on reassessment you should not revisit the question of whether a duty injury has caused or substantially contributed to the former officer's disablement. You must take as given that a duty injury caused the disablement however, you may determine the loss of earning capacity (as it relates to the duty injury) has substantially altered by virtue of non-related factors.

8. ADDITIONAL APPLICATIONS

8.1 Introduction of new injuries/conditions
The NIPB has received a number of applications to introduce a new injury/condition (previously not considered) for assessment as an injury on duty, where the applicant already has an IOD Award in payment. In some circumstances this application is made as part of a reassessment.

The NIPB has requested and received legal advice stating if an applicant wishes to introduce a new condition this should be treated as a separate application on which the four questions would need to be determined by the Selected Medical Practitioner.

For the purposes of expediency the NIPB will refer a new condition to you, as part of a reassessment, so that the requirement for examination of the applicant is minimised. However, your first task will be to assess the applicant's new injury/condition in relation to the four questions set out in section 3.1.7.

Where you determine the new injury/condition meets the criteria for an IOD Award under a) to c) you should then go on to consider d) the degree of loss of earning capacity (see section 3.10). Your assessment of the latter question should take account of all qualifying injuries (including the new injury/condition) to determine the total impact on the applicant's earning capacity.

If non-work related factors have an effect on the new injury/condition these should be taken into account, as set out in section 7 above.

In the case that you determine the new injury/condition does not meet the criteria for an IOD Award you should carry out a reassessment of the previously qualifying injuries/conditions, unless the NIPB case referral states otherwise.

8.2 New application for the same condition/incidents
In light of the finality of medical practitioner decisions contained within their report and certificate (in line with Regulations 29(5) and 30(3), subject to reconsideration under Regulation 31) there are only three scenarios under which the NIPB may consider a new application for the same condition/incidents:

i. Where the medical practitioner determined the applicant was not disabled;
ii. Where the medical practitioner determined the applicant was disabled but it was not likely to be permanent; or
iii. Where the medical practitioner determined the applicant was permanently disabled but the incidents referenced did not meet the criteria for an injury received in the execution of duty.

In the case of i) and ii) if the application relates to the same condition on which the medical practitioner has already made a final decision, the NIPB may agree to reconsideration under Regulation 31(2). Agreement will usually be granted on the basis of further medical evidence which supports the applicant's eligibility under both these questions.

With respect to scenario iii) the NIPB may agree to reconsideration, this will normally be granted so that a determination can be made on whether the new incidents relate to an injury received in the execution of duty which has caused or substantially contributed to the applicant's disablement.

In all three scenarios the assessment should not be treated as a new application. This only applies where a different condition is to be considered. You should instead follow the guidance provided in Section 12.

9. APPEALS

If you are appointed by the DOJ to act as Independent Medical Referee (IMR) in an appeal, you must act in compliance with Regulation 30 and carry out a fresh assessment of the application or reassessment.

Where it comes to your attention that you have previously treated or assessed an applicant please notify the DOJ as soon as possible as this may give rise to a conflict of interest. A different IMR will then be appointed to carry out the assessment, unless no one else is available.

Your decision must relate only to the questions considered by the SMP. You should set out your findings in a report to the parties to the appeal (the NIPB and the appellant). Your report must conclude **with a clearly expressed decision on whether the SMP's certificate should stand or needs to be altered in any way**. If you disagree with any part of the certificate of the SMP, you must issue a new certificate.

To avoid unnecessary delays in the appeals process the DOJ expects IMRs to fulfill the following key criteria:-

(a) An appellant should be provided with an appointment (via DOJ) for their appeal hearing preferably within 8 weeks, but no later than 12 weeks after you agree to act in the appeal. Where this is not possible you should contact the DOJ to advise of the next available date, at which time the DOJ can decide whether or not to refer the case to another IMR.
(b) Your report on the appeal should be forwarded to the DOJ preferably within 6 weeks, but no later than 12 weeks after the hearing/examination. Where this is not possible, you should advise the DOJ of the reason why and provide a timescale for when the report will be available.

In the event that there is more than one medical condition involved, the DOJ will appoint a Principal Independent Medical Referee (PIMR). As PIMR you should provide an overall report of your findings taking into consideration any supplementary reports by other IMRs appointed to provide a medical opinion outside of your specialism.

Your decision is final subject to review by the courts or, if the NIPB and appellant agree, it may be referred back to you for reconsideration. The appellant may also have a right of a further appeal to an Appeal Tribunal under Regulation 33.

9.1 Arranging the appeal hearing
If you agree to act as IMR, you should appoint a time and place for the appeal to be held by you. As a matter of good practice, the hearing date should be arranged through the DOJ who will liaise with the appellant and the NIPB.

In any case, you must give reasonable notice of any hearing, including any interview or medical examination you propose to hold in order to determine the appeal. This is important since the NIPB also has a right to be represented at any open or closed session - see below.

Suitable accommodation must be arranged by you, with facilities to cater for all attending and for any medical examination required. In the interests of objectivity and to avoid any 'conflict of interest' concerns, DOJ would not expect you to act in another capacity in any case where you have agreed to act as an IMR.

9.2 Evidence submitted in advance of the hearing
The appellant and the NIPB are obliged to submit any written statements or other evidence no later than 2 weeks before the date of the hearing. (It is the duty of each party to copy such material to the DOJ for onward transmission to the other party.) You should receive all papers prior to the date of the hearing.

It is also open to you to specify what evidence or further evidence you require in order to be able to consider the appeal fully. If you require access to the appellant's medical records or wish to obtain X-rays or a scan it will be for you to make the necessary arrangements through the DOJ.

On completion of the appeal you shall return to the DOJ all written statements and evidence provided by either party in support of their case (given the sensitive nature of the appeal documentation, it should be returned to DOJ double enveloped and clearly marked for the attention of the Medical Appeals Co-ordinator, DOJ, Police HR Policy Branch, Castle Buildings). DOJ will arrange for this paperwork to be returned to the NIPB and/or appellant as appropriate. IMRs should ensure all submissions provided in connection with appeals are housed in a secure environment.

9.3 Conduct of the hearing
You should follow broadly the same procedure as set out in Sections 3 to 8 except as outlined below.

You have the responsibility for ensuring that the hearing is conducted with due regard to fairness and the principles of natural justice. The following points may help:

- you are reviewing the decision of the SMP **as at the time you see the appellant;** It is hoped that in most cases the time between the decision of the SMP and the appeal hearing will be too short for the appellant's condition to have changed. However, this cannot be guaranteed.

You should therefore note that the courts have held that the appellate authority is required to consider whether the appellant is permanently disabled at the time of the appeal. You must therefore assess the appellant's current state of health in order to determine whether he or she is permanently disabled at the time of the appeal decision, not at the time of the SMP's decision.

The courts have also applied this principle to appeals against a decision on degree of disablement. You must therefore consider the appellant's loss of earning capacity at the time of the appeal.

- You are not confined to considering the application or reassessment only on the basis of the information which the SMP had;

- You are entitled to conduct a physical examination of the appellant or to appoint any other person for that purpose;

- You must read all the written evidence submitted to you before the appeal hearing and also take due account of all the oral evidence put to you at the hearing itself;

- Each party must be given a reasonable opportunity to present their arguments and to comment on the submissions (written or oral) made by the other. You should not enter into discussions about the subject matter of the appeal with either party without the other party having an opportunity to be present or represented;

- **You are not permitted, however, to accept further written submissions during or after the hearing from either party.**

  In accordance with Regulation 31 (2) of the PSNI and PSNI Reserve (Injury Benefit) Regulations 2006 and subject to the agreement of the NIPB and the appellant, a final decision of an IMR can be referred back to him for reconsideration in light of fresh evidence.

9.4 Attendance and representation at the hearing

The relevant Regulations provide that the appeal hearing, including any interview or medical examination, may be attended by the SMP and any duly qualified medical practitioner appointed for the purpose, by either party. In many cases the SMP will also act as the NIPB's medical representative at the hearing. If such medical practitioners wish to attend you **must** allow them to do so. If you would have difficulty in accepting this legal requirement, you should not agree to act as IMR.

The question of people other than nominated medical practitioners being able to attend the appeal proceedings is a matter within your discretion, possibly depending on the medical condition and factual issues you are considering. You may hold a relatively open appeal hearing where, without there being a crowd, the appellant can be accompanied by a relative, friend or other companion, or where both parties can be legally represented; this will ultimately be a matter for your discretion.

In order that justice is not only done but also seen to be done, you should take care not to exclude one party present at the appeal from any conversation or discussion you are having with the other. You should also avoid using the time before or after the appeal to hold a conversation with either party on their own, whether the matter discussed is or is not relevant to the appeal.

9.5 Appellant and NIPB submissions
Appeal to the IMR is purely on the prescribed questions under Regulation 29 considered by the SMP. You are entitled to reach your own decision on whatever evidence (including whatever additional evidence) is provided by the Appellant.

It is possible that matters of fact and legal interpretation will also arise for you to determine. Since your role as referee is quasi-judicial, you will be expected to deal with these also in your report and decision. You should decide these issues using your best endeavours to consider and evaluate the evidence put before you.

If there are disputes about facts you should ensure that each party provides you with the clearest possible evidence in support of their case, allow each party to comment on the other's evidence, and come to your decision on the balance of probabilities.

Each party to the appeal can reasonably be expected by you to support their view on an important matter of law with arguments and (if possible) legal authority for those arguments, prior to your assessment and before you reach your decision. Appellants can ask his or her staff association and/or their solicitors for legal advice, and the NIPB will have its own legal advisers.

If the parties to the appeal disagree over a point of law which you consider to be crucial, you should try to resolve the dispute before reaching your decision, by giving the parties an opportunity to submit further evidence on the issue after consulting their respective legal advisers and, if necessary, after the legal advisers have conferred with each other. You should set a deadline for responses (a month should do) to avoid the appeal dragging on unnecessarily.

10. REFUSAL BY THE CLAIMANT/APPELLANT TO BE MEDICALLY EXAMINED

Where a former officer wilfully or negligently fails to submit themselves for medical examination, as is considered necessary in order to enable a decision on the questions under Regulation 29, then -

i. If a decision is being made by the Selected Medical Practitioner, the NIPB may make its determination on such evidence and medical advice as it in its discretion thinks necessary;
ii. If the case is with the Independent Medical Referee, the appeal shall be deemed to be withdrawn (unless you and both parties agree that there are overriding reasons why an appeal should proceed in the absence of the appellant).

11. REPORT AND CERTIFICATE

A template of the report and certificate for completion on either first application or reassessment is available from NIPB or DOJ. You should explain in as much detail as possible your reasoning in coming to your decision.

As a minimum the report must contain the following:

i. The start and finish time of the examination;
ii. A list of the injuries/conditions present on examination;
iii. The evidence you reviewed;
iv. Your opinion in relation to the prescribed four questions (or the applicable questions as directed);
v. Your judgment on the most appropriate disablement banding (Slight, Minor, Major, Very Severe) and how you reached this opinion; and
vi. Your overall determination, clarifying your reasoning.

For SMPs and IMRs there will be a different procedure to follow post-assessment:

- As SMP your report and certificate should be signed, dated and saved onto the NIPB's system, so that a decision can be taken on the IOD Award.

- For the IMR, your report must conclude with a **clearly expressed decision on whether the SMP's certificate should stand or needs to be altered in any way** (including completed medical certificate if applicable). The report should **be signed and dated, and provided to the DOJ** as soon as possible after the appeal hearing. Upon determination of the appeal you should also forward your fee to the DOJ who will submit it to the NIPB for payment.

As stated above the report should include a section detailing all the medical evidence considered as part of your assessment. The name of the doctor, their qualification/specialism and the date of the report should be stated. This is to assure the applicant that all medical evidence in their case has been considered. It will also be important for use by the NIPB where an applicant provides further medical evidence subsequent to your decision, which they wish to be taken into account as part of a reconsideration under Regulation 31(2).

There are two additional matters on which your opinion is sought, if you determine on a first time application the claimant meets the criteria for an IOD Award, which are not detailed in the 2006 Regulations:

i. You should advise whether it is possible to determine the date from which the disablement commenced. If so, the date should be

completed in the relevant section of the certificate. This will be used by the NIPB as an implementation date for the IOD Award payment;

ii. You must advise when, in your assessment, the NIPB should carry out a reassessment of the IOD Award i.e. the time from which it is likely there may be an alteration in the former officer's banding.

Your opinion in relation to ii) will also be required on every reassessment you carry out so that the NIPB can determine when to next reassess the IOD Award for each case. Please note in this respect you should only recommend no further reassessment in exceptional circumstances, for example, where it is almost certain that there will never be an alteration in the former officer's banding or total disablement has been determined.

12. RECONSIDERATION UNDER REGULATION 31(2)

The NIPB and claimant may agree to refer a decision back for reconsideration by the last medical practitioner involved in their case.

Alternatively an Appeal Tribunal hearing an appeal under Regulation 33 may consider the evidence before the medical practitioner who has given the final decision (SMP or IMR) was inaccurate or inadequate and can refer the decision back to them for reconsideration (in light of such facts as the Appeal Tribunal may direct).

In a scenario where the time for appeal has expired without appeal to an IMR, or following notice of appeal to the NIPB (which has not yet been communicated to the DOJ), this will be the SMP. Otherwise the appeal would proceed and if following the appeal decision further evidence was produced a reconsideration could be carried out by the IMR (or PIMR as the case may be).

If you are unwilling or unable to act in the reconsideration please advise the NIPB or DOJ (as applicable) at the earliest opportunity. Another medical practitioner may be selected by the Appeal Tribunal or appointed, by agreement between the NIPB and claimant, to carry out the reconsideration.

DISCUSSION OF RELEVANT CASE LAW

The NIPB received advice from Mr David Scoffield QC in respect of the operation of the Injury on Duty Award Scheme. Mr Scoffield's report includes examination of or reference to a number of cases where the courts have provided authority on the interpretation of certain terms within the 2006 Regulations.

With respect to an "injury received in the execution of duty" Scoffield advises there have been a number of legal challenges in Northern Ireland on this issue and references in particular *Re Staritt and Cartwright's Application [2005] NICA 48.* Lord Justice Campbell concluded that "duty" where it appears in the regulations '*points to a requirement of a causal connection with the officer's service and it is not sufficient that the incident in question occurred during the hours of duty or while he was at work'*. He went on to state the wording of Regulation A10(2) replicated by Regulation 5(2) of the 2006 Regulations '*does not permit any further extension of the meaning of "execution of his duty" to include an officer who suffers stress as a result of a disciplinary investigation as this does not form part of his service'*.

In reaching a decision in this case, Lord Justice Campbell relied upon the authorities set down in *Stunt* [2] where Simon Brown LJ held the word "execution" means '*the fulfilment or discharge of a function of office'* and *Kellam*[3] in which Richards J stated "*that the causal connection must be with the person's service as a police officer*" and can include "*events experienced by the officer at work… and…such matters as things said or done to him by colleagues at work".*

Ex parte Stewart[4] also has significant as Lord Justice Simon Brown observed:

> '*There is no definition of "ordinary duties" in the Regulations. In my view, the phrase should be given a reasonable interpretation, and it should be borne in mind that, in a modern police force, a wide range of activities and duties is performed by officers, involving different skills and abilities.*
>
> *…the hypothetical member of the force whose ordinary duties the Regulation must have in mind is the holder of the office of constable who may properly be required to discharge any of the essential functions of that office, including therefore operational duty*.'

[2] Regina (Stunt) v Mallett (2001) EWCA Civ 265

[3] Kellam [2000] ICT 632

[4] R v Sussex Police Authority ex parte Stewart [2000] EWCA Civ 101

An extract of Scoffield's discussion of other relevant case law is set out below for information.

The relevance of decided legal cases

7.04 It is worth reflecting for a moment, however, on the reason why it is necessary to consider decided legal cases. Essentially this is because the courts are the ultimate arbiter of the meaning and effect of the Regulations[5]. If guidance is produced which fails to reflect the true legal meaning and application of the Regulations, or if a decision-making authority applies the Regulations in a way which is otherwise than in accordance with its statutory obligations, as correctly construed, then the High Court is competent to correct these errors by quashing the guidance or decision as the case may be.

7.05 The difficulty, of course, is that where there are competing interpretations of the Regulations, or where their precise meaning and effect is not clear, it can be difficult to predict with certainty precisely how a judge faced with a determination to make on these issues will do so. This difficulty ought to reduce with the more decisions there are dealing with the Regulations, or with decisions being given by superior courts such as the Court of Appeal, particularly by reason of the doctrine of precedent, since the courts ought to build on earlier judgments explaining the Regulations and be consistent with them. Where there are legal rulings providing guidance on the objectively correct legal meaning and effect of the Regulations, however, it is obviously prudent to guide one's approach to the legislative scheme on the basis of these.

7.06 Indeed, the new draft NIPB Guidance Booklet compiled in 2012 (although not, in the event, published) noted[6] that:

> *"There has also been a number of Judicial Review decisions particularly in England which have resulted in changes to how particularly injury on duty reviews are conducted. All such decisions are considered as the Board reviews its policies and procedures on an on-going basis."*

7.07 This reflects an approach which is perfectly sensible, and indeed required, namely to seek to act in accordance with the legislation as it has been explained by the courts.

7.08 One issue which was raised on a number of occasions in the course of the present review, however, was the extent to which decisions of the English courts, or decisions relating to the English Regulations, were binding on the authorities in Northern Ireland. I can deal with this issue relatively briefly. In

[5] Subject to any legislative amendment changing the law.

[6] At page 1.

theory, such decisions are of persuasive value only in Northern Ireland; but in practice it is extremely likely that they will be followed.

7.09 Dickson puts the matter succinctly in this way[7]:

"Courts in Northern Ireland, strictly speaking, are not bound to apply the law laid down by courts in England and Wales (except for the UK Supreme Court), but they very frequently do so."

7.10 In fact, there is more specific authority to the effect that it is desirable that legislation which applies on a UK-wide basis is given the same meaning by courts within the various jurisdictions of the United Kingdom. Obviously, the 2006 Regulations in Northern Ireland and the equivalent English Regulations are not contained within the one UK-wide statutory instrument. Nonetheless, they are in materially identical terms in the important respects dealt with in the cases discussed below. Accordingly, the courts in Northern Ireland are highly unlikely to consider that the same wording of the 2006 Regulations here has a different meaning or effect to materially identical wording in England, the correct construction being a matter to be objectively determined from the meaning of the statutory text.

7.11 Indeed, in her determination in the Black case, the Deputy Pensions Ombudsman referred to some English case law and then said that:

"Those cases have been concerned with the Police Injury Benefit Regulations for England and Wales, but the Northern Ireland Regulations mirror these and, therefore, the same principles can be expected to apply."

7.12 This is a fair referral of the way in which Northern Irish courts are likely to approach the issue. Unless a court here was to be persuaded that a decided English case was plainly wrong, it is highly likely to follow it. This is particularly so if the English authority in question is, or appears to be supported by, a decision of the English Court of Appeal.

Other relevant case-law

Wilson (Northern Irish Court of Appeal, July 1997)

7.67 One of the earlier Northern Ireland cases in this field is the case of Vivienne Yvonne Wilson[8]. This was a statutory appeal from an appeal tribunal constituted under the 1988 Regulations. The appellant was a serving police officer, who claimed to be entitled to a gratuity and an injury pension under Regulation B4 of the Regulations. The Police Authority for Northern Ireland refused to accept her claim, notwithstanding the issue of a certificate in her favour by the Chief Medical Officer to the RUC, and she appealed to the tribunal. The tribunal dismissed her appeal and appealed to the High Court on

[7] Dickson, *Law in Northern Ireland* (2nd edn, 2013, Hart) at paragraph 4.41(4).

[8] Unreported, Northern Ireland High Court (Carswell LCJ), 11 July 1997 (ref CARC2454).

the ground that the tribunal was wrong in law in its findings and the course which it took in dismissing her appeal.

7.68 It was not in dispute that the appellant was entitled to receive an ill-health award under Regulation B3, as it was accepted that she retired on the ground that she was permanently disabled. The question was whether she was entitled to an injury award under Regulation B4, i.e. whether she was permanently disabled as a result of an injury received without her own default in the execution of her duty as a member of the RUC.

7.69 The appellant had worked for some 11 years on covert surveillance duties and had been engaged in potentially very dangerous duties under cover, in the course of which she would have experienced considerable stress. While so engaged she appeared to cope very well with the stresses and pressures, which she regarded as "part of the job". She later transferred to a training unit, in which she used her experience to train other officers in covert surveillance. However, the Chinook helicopter crash in June 1994 had a serious effect on her mental health. She became preoccupied with the dangerous nature of the work that she had been involved in, lost heart in her work and began to entertain feelings of guilt that she had survived. She subsequently went off sick with "nervous debility", and was referred to the Occupational Health Unit, which she attended on a number of occasions.

7.70 The Chief Medical Officer to the RUC (then occupying the role of the SMP) provided a certificate indicating that the injury was sustained in the course of duty (considering the Chinook crash as simply the final straw in a cumulative process of causes). The question for the judge was the extent to which the Authority, and later the Tribunal, could reach a view on this medical question (which was referred to the SMP under regulation H1(2)) which was contrary to what was stated in the SMP's certificate.

7.71 Carwsell LCJ held on this issue as follows:

> *"The Police Authority is bound to accept the medical authority's certificate as final on the issue whether the disablement is the result of an injury received in the execution of duty. The Authority has not been given any power to refer a certifier's finding on such an issue back to him for reconsideration, in the absence of agreement by the claimant (see Regulation H3(2)). Subject to the procedural question, which I shall consider in a moment, it ought to have accepted the certificate as final, unless the parties had agreed to invoke Regulation H3(2). It was accordingly wrong in my view to reject the appellant's claim for an injury award."*

7.72 This is one of a line of authority which emphasizes the finality of the medical authority's certificate and the inability of the decision-maker (then the Police Authority, now the Board) to go behind it in the absence of an appeal against it or a proper referral back. The same reasoning applied also to the tribunal considering an appeal against the (non-medical) decision of the Police Authority. In this instance, the tribunal had heard medical evidence for itself and

taken its own view on the medical question. As to that, Carswell LCJ held as follows:

> *"When the matter came before the tribunal -- which it would ordinarily do only if the medical decision had gone against the claimant, for otherwise the Police Authority is bound to accept it -- it misconstrued its powers when it decided to hear evidence from the medical examiners and determine the medical issue for itself. In my opinion Mr Keenan's submission was correct, and it should have declined to hear medical evidence, except in so far as it might have been directed to showing that the evidence which had been before the certifier was inaccurate or inadequate. Even then, if it had been so satisfied, its proper course was then to refer the certifier's decision back to him for reconsideration in the light of such facts as the tribunal might direct. This conclusion is supported by the decision in Ead v Home Secretary [1954] 1 All ER 386, in which the Divisional Court held on similarly worded regulations that the appeal committee of quarter sessions (the analogue of the tribunal under the Regulations) was right to decline to review the conclusion of the medical referee. The court took the view that the committee was correct in holding that its jurisdiction was limited to deciding whether or not the evidence before the referee was inaccurate or inadequate, so that it could determine whether or not it should refer the matter to him for reconsideration.*
>
> *The tribunal plainly thought that the evidence before the medical examiners was insufficient to ground their conclusion, but it misconstrued its powers when it held at page 14 of its judgment that it was empowered to hear the evidence which had been before the medical authority and to adjudicate thereon. In my opinion in reaching this conclusion the tribunal failed to give proper weight to Regulation H6(2). It could, if it thought fit, have taken evidence adduced on behalf of the Police Authority tending to show that the medical examiners did not have before them certain material facts -- on the lines of the matters put to the doctors in cross-examination -- and then referred the decision back to the Chief Medical Officer. I consider that the tribunal took a mistaken view of its powers when it decided that the doctors could be called and then held that the Chief Medical Officer could not properly have answered question (c) in the affirmative."*

7.73 The reasoning here is clear, namely that the referred medical questions are a matter for the medical authority alone, in the absence of a proper appeal or a referral back; and that the medical evidence which the Board or a tribunal on appeal from the Board may consider otherwise, at least in relation to a mandatorily referred question, relates only to the question of whether there should be referral back.

Ex parte Yates (English High Court, February 1999)

7.74 R v Merseyside Police Authority, ex parte Yates[9] was an early case of an applicant claiming an IOD award on the basis of stress arising out of disciplinary proceedings against him[10]. The applicant was a Sergeant serving with the Merseyside Police Authority until he was retired on medical grounds on 21 July 1997. This was as a result of a medical examination carried out by a doctor who diagnosed the applicant as suffering from anxiety neurosis and depression, and certified that he was disabled from performing the ordinary duties of a member of the police force and that the disablement was likely to be permanent.

7.75 His illness, the applicant said, was occasioned by the stress which he suffered arising out of protracted disciplinary proceedings which had been taken against him. These proceedings had been instigated by a fellow officer, who alleged that the applicant had failed to carry out properly his duties as a custody sergeant, because he had not taken any action against two other officers for allegedly assaulting a prisoner. The applicant had been found guilty of a disciplinary offence before the Chief Constable and demoted; but had the finding of guilt set aside on an appeal to the Secretary of State and was restored to his former rank.

7.76 The authority refused to pay an injury award and, indeed, refused to even refer the case to the force medical officer (the selected medical practitioner) on the basis that it thought that the applicant's "medical condition is not consistent with a properly conducted discipline inquiry". Although the applicant's claim was dismissed on the basis of the appeal mechanism within the 1988 Regulations providing an adequate alternative remedy, the judge nonetheless went on to consider the legality of the authority having refused to refer the case to the SMP on the basis that the argument was of importance not only in this case but more generally.

7.77 Latham J began by concluding, in fairly stark terms, that the decision-making mechanisms established by the 1988 Regulations, involving the reference of certain medical questions for determination by the SMP, was unsatisfactory. He said:

> *"There is no doubt that the scheme of part H of the Regulations[11], read literally, appears to abdicate to the medical practitioner responsibility for deciding issues in relation to which he is not necessarily appropriately qualified. In the present case, an answer to the question of whether the disablement is the result of an injury received in the execution of duty is a question of mixed fact and law. On other*

[9] Unreported, English High Court (Latham J), 19 February 1999.

[10] There has been a range of further authorities since in relation to this issue, including *R v Kellam, ex p South Wales Police Authority* [2000] ICR 632; *R* (*Stunt) v Mallett* [2001] EWCA Civ 265, [2001] ICR 989; *South Wales Police Authority v Morgan* [2003] EWHC 2274 (Admin) (discussed below); in this jurisdiction, *Re Starritt & Cartwright's Application* [2005] NICA 48; and, more recently, *Merseyside Police Authority v Police Medical Appeal Board* [2009] EWHC 88 (Admin). However, this is not an issue which has arisen for detailed consideration in the course of the present review.

[11] The equivalent of Part 4 of the 2006 Regulations.

occasions, the question may well involve disputed issues of fact. It is not clear why the medical practitioner is considered the appropriate person to deal with these issues. There is merit in the contention that these are issues best determined by the Police Authority, subject to appeal to the Crown Court, which would provide a perfectly workable scheme.

I do not, however, consider that the Regulations permit anything other than a literal reading. The questions which are to be referred to the medical practitioner under reg H1(2) are unambiguous, and the answers given by the medical practitioner are, pursuant to reg H1(4) to be final. The answers will determine the claim, subject to the rights of appeal. This produces an unsatisfactory result. If the claimant is dissatisfied with the answers of the medical practitioner as to the facts upon which his opinion is based, he has an appeal to the Crown Court; if he is aggrieved by reason of the medical practitioner's medical opinion, then he has an appeal to the medical referee; if he is aggrieved by the medical practitioner's conclusions as to law as to whether or not an injury was received in the execution of duty, it would appear that he can only challenge the matter by way of judicial review. That would be one of the special circumstances in which this Court would intervene because the statutory scheme provides no effective remedy. As for the Police Authority, there is no mechanism which would enable it to correct any errors of fact upon which a medical practitioner may have based his opinion, unless they could be dressed up as issues of law, which again could be the subject matter of judicial review.

Despite the unsatisfactory consequences of the literal interpretation, I can see no way in which better sense can be made of the provisions without rewriting them." [underlined emphasis added]

7.78 As to whether the authority was entitled to reach a view that the relevant injury was not an injury sustained in the execution of duty, without referring that issue to the SMP, the Court held as follows:

"It follows that once a Police Authority applies its mind to a claim by someone such as the applicant that he is entitled to an injury pension, it is required pursuant to reg H1(2) to refer the relevant questions to a duly qualified medical practitioner. In any ordinary use of the word, the authority is "considering" the matter even if it decides to refuse the claim. It will then have refused to "admit a claim" so as to engage a right of appeal under reg H5. A claim to an injury pension is a claim to receive "as of right" an award: this, it seems to me, is simply a phrase used to differentiate between awards which are discretionary and awards which are mandatory…

It follows that a Police Authority is not entitled to pre-empt the answers of the medical practitioner by coming to adverse conclusions as to fact,

> *or law, in relation to the claim in order to avoid reference to the medical practitioner…"*

Morgan (English High Court, October 2003)

7.79 The Morgan case – R (on the application of South Wales Police Authority) v Morgan and Lewis-Davidson[12] – was a case concerning a police officer[13] suffering from permanently disabling depression which had three causes, only one of which, overwork, was a duty injury. Stanley Burnton J concluded that the Medical Referee had wrongly failed to distinguish between a duty injury and non-duty injuries in his assessment of the degree of disablement attributable to the duty injury. This is a case describing in stark terms what has become known as the approach of 'apportionment'.

7.80 The judge drew the distinction between, on the one hand, whether under regulation A13 a duty injury caused or substantially contributed to permanent disablement – which was the causal, or entitlement question arising under regulation H2(2)(c) – and, on the other hand, the degree of disablement which was relevant to the calculation of the quantum of gratuity and pension to be paid to those entitled to an injury award, which was the question under H2(2)(d).

7.81 The relevant degree of disablement for the latter question was not determined by the fact that the duty injury had been found to have caused, or substantially contributed to, permanent disablement at the entitlement stage. This is the distinction I have drawn at paragraphs 4.89 and 4.90 above as to the different assessments of causation which have to be undertaken in relation to initial entitlement (did the duty injury cause or substantially contribute to permanent disablement?)[14] and quantification of the award to which the officer is entitled, whether initially or on review (to what degree has his earning capacity been affected as a result of the duty injury?)[15].

7.82 At paragraphs [20]-[21] the judge commented as follows:

> *"Regulation A13 requires disablement to be deemed to be the result of an injury if that injury substantially contributed to the disablement. It follows that provided [the second defendant's] depression caused by overwork was a substantial cause of his disablement, his disablement was the result of an injury received in the execution of his duty. It is understandable, therefore, that the Police Authority conceded that the answer to the question posed in regulation H1(2)(c) was affirmative. However, this case concerns not the question required to be answered by regulation H1(2)(c), but that posed by regulation H1(2)(d).*

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[12] [2003] EWHC 2274 Admin.

[13] The second defendant; the first defendant, from which the case generally receives the short name by which it is referred to, being the relevant medical practitioner.

[14] Now encapsulated in regulations 7 and 29(2)(c) of the 2006 Regulations.

[15] Now encapsulated in regulations 6(5) and 29(2)(d) of the 2006 Regulations.

> *… If there are separate injuries, of which one is a duty injury and one is not, the degree of disablement falls to be assessed in relation only by reference to the affect of the former on the earning capacity of the person in question. Regulation A12(3) refers to the result of the duty injury only. Regulation A13 does not require a different result: it applies to the question whether disablement is the result of an injury, not the degree to which earning capacity has been affected as a result of a duty injury."*

7.83 The judge went on to consider that the ability, under (the equivalent of) our regulation 6(5) to apportion the effect of different injuries on an officer's earning capacity was sensible, giving the following examples in paragraph [22] of his judgment:

> *"To take an extreme example, if a person lost the use of his left hand as a result of a duty injury, he would suffer from a disablement as defined in reg A12(2). If, while on leave subsequently he lost the use of his right hand as a result of a non-duty injury, it would not be rational to determine an injury award on the basis of the loss of earning capacity resulting from the combined injuries. Less obvious examples may be given, as where a loss of mobility caused by a broken leg, suffered in the execution of duty, and sufficient to cause disablement, is exacerbated by a subsequent non-duty injury to the same leg. In one sense, the disablement is the same before and after the second injury, ie an inability to run or to walk normally; but in my judgment only the first injury is relevant to the assessment of the degree of disablement."*

7.84 These were straightforward examples of several different injuries. In paragraph [25] of his judgment, however, Stanley Burnton J turned to the more complex question of a case where there was merely one injury but several causes:

> *"… it does not follow that, where the disability is the result of a single injury, received partly in the execution of duty and partly not, the same applies… The Regulations distinguish between injury and disability. It does not follow from the proposition that only the degree of disability resulting from the relevant injury is to be assessed that a similar approach is required where there is only a single injury, but it has multiple causes, or it has been exacerbated by non-duty matters, as where a disabling depression is the result of a predisposition to depressive illness or concurrent causes of stress… In such a case, there is no real distinction between injury (depression) and disablement, and in accordance with normal principles of causation it is sufficient if the duty cause is a substantial cause of the injury."*

7.85 The judgment of Stanley Burnton J in Morgan was discussed and applied in the soon following case of Crocker, to which I now turn.

Crocker (English High Court, December 2003)

7.86 The Crocker case – R (South Wales Police Authority) v The Medical Referee[16] – also dealt with the issue of apportionment; and is a very important authority in terms of how some of the more difficult apportionment questions should be approached. The claimant, the South Wales Police Authority, sought to quash a decision of the defendant Medical Referee that Mr Crocker, a police officer who was retired on 3 March 2002, had lost all earning capacity as a result of an injury received in the execution of his duty. The authority contended that only 40% of Mr Crocker's earning capacity had been lost because of the duty injury, which the SMP accepted. Mr Crocker appealed against that decision to Dr Anton, the defendant IMR.

7.87 The Police Authority claimed that on the medical evidence accepted by the IMR, Mr Crocker had some, or some potential, earning capacity, and that the IMR's decision had been wrongly affected by his assessment of how employers would react to the officer's medical history, a factor irrelevant to the assessment of earning capacity. Importantly, the Police Authority also claimed that the IMR had failed to apportion Mr Crocker's loss of earning capacity between the injury sustained in the execution of his duty (stress at work) and an earlier injury which had not been sustained in the execution of his duty (a chemical imbalance in the brain). It was this latter injury, in combination with his stress at work, which, the claimant said, had led to Mr Crocker's schizoaffective psychosis.

7.88 One of the key issues in the case was the extent to which an SMP or IMR conducting a review had to look to the future, an issue which arose on the facts of the Crocker case because, although a view was taken that Mr Crocker was at that time "effectively unemployable", there were a number of comments in the medical evidence about the possibility of his condition improving over the next number of years to the extent that he could work again. Part of the authority's case seems to have been that these future possible improvements had not been adequately taken into account and that there was an undue focus purely on the Mr Crocker's current presentation.

7.89 In paragraphs [32]-[33] of his judgment, Ouseley J said this:

> *"The starting point is Regulation A12(3). It requires an assessment of how earning capacity "has been affected", not of how it is likely to be affected. There is a degree of contrast with the language of the assessment of permanent disablement which does look forward. It requires someone disabled to be, or to be "likely to be", permanently disabled as at the time when the assessment is made. The same review provision applies to both, but it shows that the <u>assessment of how earning capacity has been affected is not to be answered by reference even to what is likely to eventuate, let alone by reference to any more remote possibilities</u>. This makes sense in the context of legislation which provides for reviews of both the degree of*

[16] [2003] EWHC 3115 Admin. (Mr Crocker, the officer concerned, was represented as an interested party in the case).

disablement and of the effect of that disablement on earning capacity. These are reviews which can be undertaken as occasion requires rather than at mandatory but necessarily arbitrary intervals.

The concept of earning capacity might be thought itself to contain an element of future potential, but the more normal connotations of capacity are of what is now achievable, to be contrasted with actual achievement, rather than with what in the future might become achievable." [underlined emphasis added]

7.90 *Accordingly, on the basis of the text of the relevant Regulations, and the purpose behind the review system (which permitted circumstances to be re-examined when required by reason of change of circumstance) the judge was of the view that an assessment of earning capacity should focus on present capacity ("what is now achievable") rather than speculating on what might happen in the future.*

7.91 *This approach is further explained in paragraphs [38]-[39] of the judgment:*

"I regard the review provision as the key. There is no need to speculate. As and when circumstances dictate, the pension is reviewed. The doctors, the Medical Referee, and Selected Medical Practitioner can, and here did, indicate when they thought that that should happen. Such a power is wholly inconsistent with a need to forecast the future and then to test the calculation of the forecast against the actual out turn on a number of occasions. The means by review of correcting the pension when circumstances change obviates the need not just to speculate, but to speculate and review as well.

I also consider that some of the problems which can arise if the Medical Referee and Selected Medical Practitioner were required to look beyond the present are not ones which it would have been left for a doctor to resolve. The way in which one might assess someone who is now wholly without earning capacity, but who was likely to regain 50% in two years, and might regain 75% in four years, is a problem for a rather different expertise. The Regulations make no provision for that sort of calculation, which, I believe, they would have done had that been intended. Instead, they have provided for the simple mechanism of review without arbitrary limit on the number or intervals between them."

7.92 *Accordingly, the assessment on review was simply a matter of considering what the officer's earning capacity was at that time. The matter was pithily stated by the judge in paragraph [42] of his judgment:*

"The task, in my judgment, in assessing earning capacity is to assess what the interested party is capable of doing and thus capable of earning. It is not a labour market assessment, or an assessment of

whether somebody would actually pay him to do what he is capable of doing, whether or not in competition with other workers."

7.93 *The judge later turned to the issue of apportionment. In paragraph [51] of his judgment, he accepted that there was a distinction in the Regulations between the provision dealing with entitlement (our regulation 7) and that which deals with the degree of disablement (our regulation 6(5)) – the distinction drawn by Stanley Burnton J in the Morgan case and discussed above. On the issue of apportionment generally, the judge in Crocker said this[17]:*

> *"I accept that there is a distinction in the Regulations between A13, which deals with entitlement, and A12(3), which deals with the degree of disablement. There was no dispute but that Mr Crocker had suffered a duty injury which caused, or substantially contributed to, his disablement. He was, therefore, entitled to an injury award. The degree of disablement then fell to be examined under A12(3). A12(3) contains two components which are relevant to the answers to the question in H2(2)(d), which deals with the degree of disablement. First, the degree of disablement has to be assessed. This is assessed by the degree of loss of earning capacity. Second, it is necessary to determine the degree to which that loss is the result "of an injury received without his own default in the execution of his duty as a member of a police force." It is necessary, therefore, to discount the effect of any non-qualifying injury and any other cause whether classified as an injury or not. This could either be a non-duty injury, or an injury received through his own default, or some other cause. The focus of the Regulations is therefore not exclusively on contrasting duty and non-duty injuries. Although the latter are the most obvious example of a second cause of the loss of earning capacity, I do not consider that they represent the limits of what has to be disregarded for this purpose. I consider that what has to be disregarded is every factor which has affected the loss of earning capacity other than the duty injury.*
>
> *… The policy behind this requirement for apportionment is simple: an injury award should not be paid other than for injury received and earning capacity lost in the execution of the officer's duty. The assessment process should thus discount the effect of any other factors. It looks for the loss caused by the duty injury and nothing else.*
>
> *So the question to be answered under the Regulations is what degree of the loss of earning capacity is the result of the duty injury? This seemingly simple question can give rise to acute problems of causation, even though the question of whether or not there has been a disability which the duty injury has caused, or substantially contributed to, has already been answered. A separate issue of causation arises at the apportionment stage, because the entitlement*

[17] At paragraphs [51]-[53] of the judgment.

stage can be passed on the basis of an injury which substantially contributes to, but is not the whole cause of, disablement."

7.94 *So, the policy behind the requirement of apportionment is explained, as is the question to be answered under the Regulations. Ouseley J immediately recognized, however, that this "seemingly simple question" can give rise to very difficult issues. A number of these issues are discussed, and a course plotted through them, in paragraphs [54] to [61] of the decision of Ouseley J. Although this is a lengthy quotation from the judgment, I am not sure that I can do better than simply setting it out extensively again for consideration:*

"[54] The position may be simple enough at least conceptually, where there are two separate causes of the loss of earning capacity, each making a contribution to the total loss. That is clearly the situation envisaged in the Home Office guidance. The position is more complex where the total loss is attributable to the effect of a duty injury on an underlying condition, which may or may not be an injury within the definition in the Regulations, and which by itself may or may not have contributed to a separate loss of earning capacity. An officer might suffer from a condition which would not affect him or his earning capacity until aggravated by a duty injury. These may be circumstances, for example, in which an officer in better physical shape would have avoided any injury or loss of earning capacity.

[55] I do not consider that the question of apportionment should be answered by trying to attribute a share of the loss of earning capacity to any underlying condition which, on its own, had not, or did not, cause a loss of earning capacity. The loss should be attributed wholly to the duty injury which, albeit because of that underlying condition, has directly caused the loss of earning capacity.

[56] I consider that this approach reflects the statutory question which has to be answered. It is a straightforward approach which fits with the process for making the assessment, which is comparatively informal, and one in which doctors, and not lawyers or philosophers, make the decisions. Although it may be objected that the straw which broke the camel's back may enable its owner to attribute the whole of its breakdown to a small additional load, it does at least reflect the fact that up to that moment there had been no loss of capacity for work. As the object of the Regulations is to enable an award to be made for the loss of earning capacity caused by the duty injury, it is important to see whether the underlying illness or condition had actually caused any such loss before it was affected by the duty injury.

[57] I also think that this avoids the anomalies which could arise if underlying causes of the duty injury, or of its extent, could be brought in when, in reality, it is the impact of the duty injury upon it which has caused the loss of earning capacity…

[59] Before apportionment can arise each factor must separately cause some degree of loss on its own. Although one may be able to analyse this case as a "two injury case", or "one injury exacerbating another", that is not at root a medical question. It is a causation question, or a question of where responsibility should be attributed for the loss of earning capacity in the context of these Regulations. The attribution of responsibility is the question at root so often in causation cases. It is a legal question whether if the first factor has not separately caused an injury, it is nonetheless to be treated as part of the cause of loss. Both components may pass the "but for" test, a test which is neither always necessary, nor usually a sufficient condition, for responsibility.

[60] Applying that approach here, if the stress at work caused the whole of the loss of earning capacity, whatever that degree of loss might be, it does not matter that the loss was caused by the impact of the duty injury on the underlying chemical imbalance in the brain. It is irrelevant that the stress would have had no effect upon the loss of earning capacity if there had been no underlying chemical imbalance. On the other hand, if that underlying condition by itself had already caused a loss of earning capacity, which was then worsened as a matter of degree by the stress at work, the duty injury, increasing the loss of earning capacity, the total loss would fall to be apportioned between the two causes.

[61] It is not a question of whether that loss would have happened in due course as a result of the underlying condition alone, but a question of whether it actually had caused part of the loss of the earning capacity. There is a distinction to be drawn between the position where a duty injury and other causes, such as another injury, each separately cause a degree of disablement and loss of earning capacity, and the position where the non-duty injury has caused no loss of earning capacity itself but which the duty injury has exacerbated thereby causing the loss. Any other approach would, in this context, involve asking not what degree of disablement and loss was caused by the duty injury, but instead asking what caused the illness or injury."

7.95 *Ouseley J made the point that he had not been referred to any of the many and, at times, difficult cases in the law of tort on causation of loss and liability[18]. He felt that the IMR was unlikely to have felt assisted by considering such authorities, that being "an inappropriately sophisticated approach to take in a case of a Medical Referee decision"; although he regarded his conclusions as consistent with the approach which the common law would apply in any event and "a broad and… simple approach in the context of this legislation and its purpose". Ouseley J further considered his approach to be consistent with what Stanley Burnton J had said in paragraph [25] of his judgment in Morgan[19].*

[18] See paragraph [62] of the judgment.

[19] See paragraph 7.84 above.

7.96 *It is impossible to summarise the reasoning and effect of Ouseley J's judgment in just a few sentences (which is why I have set out portions of it above in extenso). However, it seems clear that this is a strong endorsement of the principle that where a duty injury is the 'straw which broke the camel's back', it should still be regarded as the factor causing the loss of earning capacity; unless it is clear that the pre-existing condition had itself, independently and before the duty injury, resulted in an extant and actual loss of earning capacity.*

Pollard (English High Court, February 2009)

7.97 *The Pollard case – R (Pollard) v The Police Medical Appeal Board and West Yorkshire Police Authority[20] – is an important case in relation to the slightly different concept of 're-visiting causation'. Ms Pollard was a former police officer who challenged a decision of the PMAB made on 25 October 2007 under the English Regulations (on an appeal brought by her against a decision by an SMP), which held that her degree of disablement was assessed at nil per cent as "her current disability was not causally related to the index incident in 1974". This overturned earlier decisions of an SMP which were given on 5 March 1987 and 11 May 1988, when the claimant was assessed as 51% disabled as a result of an injury that she incurred in 1974 when she was on duty as a police woman.*

7.98 *The index incident had happened in 1974 when the claimant had injured her back in the course of effecting the arrest of a woman who was violent and drunk. Her back condition continually worsened and, in 1985, she was diagnosed by a consultant orthopaedic surgeon as having a degenerative lumbar disc; before being medically discharged from the police in 1986. Shortly after this she was assessed by two SMPs. The first determined that the disability was the result of an injury on duty and assessed the degree of disablement at 51%, recommending that the authority should reconsider whether the degree of disablement had altered in a further year's time. This led to a second SMP considering the claimant's case in 1988. He made an identical assessment but did not recommend that the degree of disablement be reassessed, indicating that he did not consider there was any possibility of recovery and therefore he did not need to see the claimant again.*

7.99 *In 2003 Ms Pollard was told by the authority that her disablement would be reviewed. She was then seen by a Dr Freeland as SMP, who concluded that she was suffering from chronic back lumbar spondylosis and cervical spondylosis, but that the degree to which her earlier capacity was affected was 0%. He accepted that the claimant had a significant level of current functional disablement but he reached the conclusion which he did because he did not consider that there was any sufficient link between the claimant's injury on duty and the level of disability. He recorded that he could find no evidence in the file that the index incident made a significant contribution to the development of the lumbar disc degeneration.*

[20] [2009] EWHC 403.

7.100 *The claimant appealed against Dr Freeland's determination. There was criticism of the paperwork available to him since he reached his decision on the claimant's case without sight of the her occupational health records or a full set of her 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 (although the SMPs who had earlier considered her case had seen these). In addition, when Dr Freeland reached his conclusion part of the claimant's personnel file was available but it was incomplete; and her general practitioner records were only available from 1979 onwards. No further records were available by the time the case came before the board.*

7.101 *Amongst other things, the claimant also contended in her appeal to the PMAB 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 Board considered the case in October 2007. It comprised a consultant occupational health physician and a consultant in orthopaedic medicine. Notwithstanding divergent medical evidence, in particular a report relied upon by the claimant (which indicated that she had degenerative changes brought on by the duty incident) the orthopaedic specialist member of the board concluded that there was no evidence of tissue injury which could have been the consequence of a strain of the lower back sustained when on duty in 1974. The Board also concluded that there was no evidence of catastrophic injury to her back; and that the index incident would have given rise only to a soft tissue injury which would have resolved shortly afterwards. Accordingly, although the Board accepted that Ms Pollard's level of functional disability was probably such that she could not work part-time, they also concluded that this was not attributable to the index injury but, rather, to constitutional degenerative change.*

7.102 *The claimant challenged the Board's decision by way of judicial review. Unusually, neither the PMAB nor the relevant police force was represented in the proceedings[21]. Inter alia, the claimant contended that the SMP decisions in 1986 and 1988 conclusively decided that her lumbar disc degeneration and spondylosis was caused by a duty injury; and 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) within regulation 30(2), namely the degree of the disablement of the officer. She further contended that neither the SMP nor the Board had in fact answered this question but that, instead, they had reached a decision that the degree of disablement was 0% by a direct consideration of question (c), namely whether her undoubted lumbar disc degeneration was caused by an injury on duty, carrying out a fresh investigation into the question of causation on the merits.*

7.103 *At paragraph [28] Silber J referred to the issue of apportionment in the following terms: "The language of reg 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."*

[21] See paragraphs [3] and [4] of the judgment of Silber J.

7.104 *At paragarphs [34] to [40] Silber J set out what he considered the Regulations required of SMPs:*

> *"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 reg 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 reg 30(6)).*
>
> *3. Where an injury pension is payable, the police authority shall at suitable intervals, in the words of reg 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 reg 30(2)(a), (b) and (c) but only on the matters set out in reg 30(2)(d) which relate to the degree of the person's disablement. Indeed, this is made clear in the closing words of reg 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 reg 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." [underlined emphasis added]*

7.105 *Applying those principles, Silber J went on to state that he was 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.*

7.106 *The import of this decision is that, on a review, the only question which may be considered is the extent of the degree of disablement. Whilst this may embrace the concept of apportionment discussed above (apportioning*

the loss of earnings capacity between a duty injury and one or more non-duty injuries or conditions), it does not permit the questions of whether the officer concerned is disabled, whether that disablement is likely to be permanent or, crucially, whether the disablement is the result of an injury received in the execution of duty to be reconsidered.

Turner (July 2009, English High Court)

7.107 *The Turner case – R (Turner) v The Police Medical Board[22] – is another significant case in relation to the question of re-visiting causation, which followed closely on the heels of Pollard. The claimant, Mr Turner, was a serving police officer in the Metropolitan Police from 24 October 1984, until he retired on grounds of ill health on 24 September 2001. When he retired from the police force in 2001 he had lost all effective hearing in his left ear; and this was the ground for his retirement. He worked subsequently as a salesman and as a police intelligence analyst, but later gave this up to work as a full-time carer for his disabled wife.*

7.108 *There were a number of potential or speculated causes for the loss of hearing in his left ear. He had engaged in a limited amount of rough shooting as a young man with a rifle on occasions, from about the age of 16 to the age of 25, doing so on occasions without ear protectors. The other potential causes of the hearing loss all, one way or the other, related to his employment with the police. He engaged in firearms training as a police officer on some occasions without ear protectors. When a police cadet, he was also subject to an assault in June 1984 when he was kicked in the head and became unconscious. He was again subject to a less serious assault in 1990 when he was hit on the left side of the head. The only other possible cause of the damage to the ear, not supported by any medical evidence, was possibly some genetic condition or other medical cause unconnected to his work.*

7.109 *However, following his retirement, he claimed an injury benefit and, notwithstanding contested positions taken on both sides with the benefit of medical reports, there was an appeal by the claimant to a medical referee, Dr Bray, whose decision was that Mr Turner was entitled to a 100 per cent pension, on the basis that he resolved the issue of causation favourably to the claimant (that is to say, he considered the loss of hearing was entirely caused by duty injury).*

7.110 *The judge commented that "very sensibly" there is a review mechanism within the Regulations (regulation 37 of the English Regulations) and stated that: "That express provision for occasional review or reassessment of the pension is obviously intended to look at whether there have been any alterations for the worse or the better since the original final assessment by, in this case, Dr Bray" [underlined emphasis added][23].*

[22] [2009] EWHC 1867 (Admin); [2009] All ER (D) 183 (Aug).

[23] See paragraphs [9] and [10] of the judgment.

7.111 *There was a review conducted by an SMP, Dr Porrit, in 2007. She issued a certificate on 18 October 2007 finding that the claimant's degree of disablement had "substantially altered". She reached this conclusion by deciding that the claimant could do one of three jobs, such that she considered there was a reduction in the potential loss of earnings as a result of the injury. The three jobs relied upon were: police station reception manager, local authority neighbourhood coordinator and junior manager. The job of junior manager was that which in fact Mr Turner had performed, with minor adjustments, at all times until his retirement and it was not in dispute that the pension could and should be assessed by reference to his earning capacity as a junior manager.*

7.112 *The claimant, however, challenged the suggestion that he was able to work in either of the other two capacities, which were jobs which had been available (it was not in dispute) in 2002. He appealed to the Police Medical Appeal Board, saying that he was physically unable to perform those two jobs and was supported by a medical report from a Dr Fairley. The PMAB accepted the claimant's case on appeal in respect of the jobs, i.e. that the SMP had erred in relation to the two other jobs, so that it became common ground that the appropriate comparator was the job of junior manager.*

7.113 *However, the PMAB reopened the whole question by reconsidering the report of Dr Bray from 2001. It recorded that it was "not convinced by the arguments [Dr Bray] put forward that the police firearms training and the physical injuries were necessarily the major causes of the left hearing loss". The Board went on to find that "the contribution of any hearing loss directly related to the index incident at the very best could only account for some 50 per cent of his overall disability". It thus reduced the claimant's pension by 50 per cent from 28% reduction in earning capacity, which was the undisputed reduction, to a 14% reduction in earning capacity (by virtue of the applicability of the new 50% divisor), thus reducing him to a lower band award.*

7.114 *The claimant submitted, inter alia, that the PMAB "had no business interfering with or reviewing or reconsidering" the decision of Dr Bray, whose decision in 2001 was final and had not been appealed; and, secondly, that the question for the PMAB was whether the degree of disablement had altered in the interval since the last 'final' determination. He relied on both the Crocker case and the Pollard case. In particular, the parties appeared to agree[24] that Silber J had effectively decided the very point in Pollard.*

7.115 *Burton J commented[25] that:*

> *"It does appear to me to be fundamental in this case that Regulation 30 and Regulation 37 have an entirely different role. Regulation 30 may well raise questions of great difficulty, such as here in relation to causation… <u>It is important from the point of view of disputes such as pension entitlement that a decision once made should be final if at all</u>*

[24] See paragraph [20] of the judgment.

[25] In paragraph [21] of the judgment.

> *possible, and that is what is provided by these Regulations. But causation questions having been put aside, 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." [underlined emphasis added]*

7.116 *Accordingly, there was and is a tension between the requirements of finality and the possibility of review where some change in circumstance no longer justifies the level of award. At paragraph [23] of the decision, having referred to the Crocker case, Burton J considered that "it would not justify starting from scratch in relation to earning capacity, because in the present case what is posed under Regulation 37 is the degree if any to which the pensioner's disablement has altered". He continued:*

> *"By virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving. To that extent, therefore, the approach by the SMP, had it been justifiable, which it was not because it had been overturned on appeal by the PMAB, would have been relevant. [Counsel for the claimant] accepts that if there is now some job available which the defendant would be able to take by virtue either of some improvement in his condition or in the sudden onset of availability of such a job then that would be a relevant factor. But it would all hang on the issue of alteration or change after "such intervals as may be suitable". There is no question of relitigation and, of course, suitable intervals suggests that this is not a matter which should be revisited every year, nor is it."*

7.117 *Ultimately, the judge concluded[26] that the PMAB had impermissibly revisited the original decision of Dr Bray without addressing the task imposed upon them by regulation 37 of the English Regulations; and that, had they applied the test under regulation 37, they would have found that the degree of Mr Turner's disablement had not altered. Finally, he agreed with and endorsed the similar approach taken by Silber J in Pollard, although making clear that he would have reached (and in fact did reach) the same conclusion entirely independently.*

Laws (English Court of Appeal, October 2010)

7.118 *The Laws case – Laws v Metropolitan Police Authority[27] – is a significant case in this field since it is a decision of the English Court of Appeal, rather than merely a judgment of the High Court at first instance, and it has been referred to and followed in subsequent cases (including Simpson). It also concerned what could and could not be reconsidered in the course of a review under the Regulations.*

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[26] See paragraphs [24] and [25].

[27] [2010] EWCA Civ 1099; [2010] All ER (D) 135 (Oct).

7.119 *The claimant, Mrs Laws, joined the Metropolitan Police as a uniformed police officer in 1995 at the age of 27. In October 1997 she was assaulted and injured while attempting to handcuff a suspected person. Contemporaneous reports evidenced that the claimant sustained a slight soft tissue injury. Her condition deteriorated and she sought an injury award under the Police Pension Regulations 1987. In February 1999, the claimant was retired from service with the defendant on ill health grounds having been assessed as permanently disabled from performing the ordinary duties of a member of the police force. A number of pension review assessments were made of the claimant, which assessed that her degree of disablement was 85%. At this stage it was clear that the claimant was suffering from psychiatric difficulties but the IMR considered that these flowed directly from her physical injuries. In 2002 and 2005, Mrs Laws' degree of disablement was maintained at 85% on reviews.*

7.120 *In 2008, Mrs Laws' next pension review was conducted by an SMP. At this stage she had several co-existing conditions. The Police Authority put forward three comparative jobs which, on a reduced hours basis, led the SMP to assess the claimant's degree of disablement at 25%. The claimant appealed. The appeal was heard in March 2009 by the Police Medical Appeals Board (PMAB). The appeal was dismissed. In the course of this the SMP who had reduced the degree of disablement was questioned about the reduction and relied, inter alia, on the fact that the claimant now had multiple pains; that the review process was now more robust than previously and that in each and every case a job comparison study is undertaken; and that "degree of disablement is fundamentally related to the impact upon earnings capacity, rather than the clinical condition per se".*

7.121 *The PMAB described its duty as being to assess the current impact upon earnings of the index event and then to determine the degree of disablement as defined in the Police (Injury Benefit) Regulations 2006. The PMAB noted that there was an inconsistency between the injuries described by the claimant under questioning and those recorded at the time of the injury and that the claimant reported symptoms unrelated to the incident and which were unsupported by clinical findings. The PMAB assessed that the claimant had the competencies to carry out the roles put forward by the defendant, having considered her mobility, level of functioning and further studies. The PMAB upheld the 25% disablement assessment. The claimant then sought judicial review of the PMAB's decision.*

7.122 *In November 2009 the claimant succeeded in her challenge, the judge (Cox J) finding, inter alia, that the PMAB had incorrectly applied the Regulations and had erroneously conducted a fresh assessment of the claimant's degree of disablement and its causes, rather than assessing whether the degree of disablement had substantially altered since the last review as required by the Regulations. In particular, the judge held that a review under regulation 37 did not allow for any redetermination of the merits of any earlier decision of either the SMP or the PMAB. The Police Authority appealed.*

7.123 *The Authority submitted, inter alia, that the starting point for the SMP or PMAB was to consider the pensioner's current degree of disablement and compare it with the previous assessment. The requirement to treat the previous assessment as 'final' did not oblige the PMAB to accept all the clinical judgments made in or for the purpose of the previous assessment; it meant only that the PMAB had to accept that the pensioner was entitled to whatever pension was then fixed. Further, the Authority submitted that it was open to the PMAB to arrive at its own assessment on a review by a process of reasoning which might involve a frank departure from earlier clinical judgments.*

7.124 *The Court of Appeal (Laws, Munby and Black LJJ) unanimously dismissed the appeal, finding, in referral, that the first instance judge had been correct in her approach to the Regulations. The requirement of finality in regulation 30(6) of the Regulations[28] did not merely apply to the percentage figure arrived at to represent the pensioner's disability. It applied also to the decision of the SMP on the question or questions referred to him. That included the essential judgment or judgments on which the decision was based. That was confirmed by regulation 31(3) of the Regulations[29], which required the PMAB's decision to be in the form of a written report. The premise under regulation 37(1) of the Regulations in relation to reviews was that the defendant, via the SMP or PMAB, was to consider whether the degree of the pensioner's disablement had altered and that meant that the earlier decision as to the degree of disablement was to be taken as a given. The only duty was to decide whether, since that review, there had been a change, not merely in the outturn figure but also on the substance of the degree of disablement. It was not open to the SMP or PMAB to reduce a pension on a regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong and equally it was not open to them to increase a pension in such a way.*

7.125 *The lead judgment was given by Laws LJ. In paragraphs [16]-[19] he rejected the suggestion on the part of the Police Authority that a review was essentially a fresh determination of the effect of a duty injury on a former officer's earning capacity, in which the SMP was free to reconsider earlier clinical judgments. He held that this approach "cannot sit with the language of the Regulations" since the requirement of finality in relation to an SMP's certificate and report did not relate only to the percentage figure arrived at but "must include the essential judgment or judgments on which the decision is based". The result was concisely described by the judge in paragraph [18] of his judgment, in discussing the role of the SMP to consider whether the degree of the pensioner's disablement has altered:*

> *"The premise is that the earlier decision as to the degree of disablement is taken as a given; and the duty – the only duty – is to decide whether, since then, there has been a change: "substantially*

[28] Regulation 29(5) of our 2006 Regulations.

[29] Regulation 30(3) of our 2006 Regulations, relating to a report and certificate of an IMR.

> *altered", in the words of the Regulation. The focus is not merely on the outturn figure, but on the substance of the degree of disablement." [underlined emphasis added; italicized emphasis in original]*

7.126 *As we have seen in the discussion of the Simpson judgment, this construction of the Regulations' requirements in relation to reviews is one which has been applied and developed in later cases. In short, what Laws LJ appears to me to have been saying is that a review must carefully and solely focus on whether something has changed since the last certificate. It cannot reconsider issues determined before the last certificate was issued or in the course of it being issued; nor matters which arose before then. The purpose of a review is to look simply at what, if anything, has changed since the last determination.*

7.127 *In turn, the purpose of this approach (and part of the reason why it is to be considered the correct interpretation of the Regulations), is "to provide a high level of certainty in the assessment of police injury pensions" (see paragraph [19] of the judgment). Clinical findings are not to be revisited outside the strict statutory mechanisms of appeal or referral back (or, exceptionally, judicial review). It is not the purpose of a regulation 37 review[30] to fix earlier errors – whether in favour of the pensioner or the authority. Thus, Laws LJ also held that:*

> *"It is not open to the SMP/Board to reduce a pension on a Regulation 37(1) review by virtue of a conclusion that the clinical basis of an earlier assessment was wrong. Equally, of course, they may not increase a pension by reference to such a conclusion; and it is right to note that Mr Butler, appearing for the Board, voiced his client's concern that so confined an approach to earlier clinical findings might in some cases work to the disadvantage of police pensioners. Strictly that is so. But the clear legislative purpose is to achieve a degree of certainty from one review to the next such that the pension awarded does not fall to be reduced or increased by a change of mind as to an earlier clinical finding where the finding was a driver of the pension then awarded."*

7.128 *This construction may seem surprising, namely that a mistake in an earlier assessment and certificate cannot be corrected if picked up by another (or even the same) doctor at a later review. However, the judgment of the Court of Appeal in Laws is clear that the Regulations' focus on certainty has this result. The legislative scheme could be drafted differently – with a wider remit available on review to correct erroneous conclusions reached at an earlier stage[31] – but that is not what the Court found the current scheme to provide for. Barring appeal or referral back within the terms of the Regulations (or successful challenge by judicial review), a certificate and the conclusions on which it is based are final and cannot be revisited on review.*

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[30] Or, in the case of the 2006 Regulations in Northern Ireland, a regulation 35 review.

[31] Or conclusions which seemed correct at the time and have only been shown to be erroneous through subsequent developments.

7.129 *Taking as read, then, that a review must only focus on what has changed since the last determination or review and cannot 'start from scratch', what type of changes can lead to a conclusion that the pensioner's degree of disablement has changed. Laws provides some assistance on this issue, although not a detailed discussion. Firstly, it seems clear that there must be some "actual" change in the pensioner's circumstances. This can be gleaned from paragraph [21] of the judgment:*

> *"[Counsel for the Police Authority] submitted that if (as I would hold in agreement with the judge) it was necessary to find an actual change in the degree of the claimant's disablement, the Board properly so found. The difficulty is that while no doubt the Board had regard to events occurring since 2005, it is clear that they also revisited earlier conclusions..." [underlined emphasis added]*

7.130 *Again, the emphasis is on something actually having changed, or an event actually having occurred, since the last certificate or review. What then constitutes such a change or event? An interesting supplementary argument in the Laws case – on which the Court of Appeal disagreed with the judgment of Cox J – was whether the attainment by the claimant of a law degree since her previous review was a relevant new circumstance which might affect her present earning capacity. The judge had effectively held that the only change which might be relevant for the purposes of a review was a change in the injury which had been sustained in the execution of duty[32].*

7.131 *On this issue, Laws LJ held at paragraph [27] as follows:*

> *"Here I think the judge was in error. She has approached Regulation 7(5) as if it meant that the pensioner's earning capacity is fixed, unaffected by anything save the duty injury. That would be highly artificial, and is not what the Regulation contemplates. Its terms allow for the obvious possibility that the pensioner's earning capacity may vary from time to time by force of external factors (and of course one pensioner's earning capacity will differ from another's). Objectively, the extent to which a pensioner remains disabled from work by reason of a duty injury must be capable of being affected by the acquisition of new skills. The question under 7(5) then is, what is the impact of the duty injury on the pensioner's earning capacity as the SMP/Board find it on the facts before them. I have some sympathy with the view, forcefully urged by [counsel for Ms Laws], that if matters such as his client's law degree were taken into account, there would be a "disincentive to acquiring new skills" (skeleton argument paragraph 7.3). But the regime is designed to meet objective need; and Burton J in Turner was surely right to observe at paragraph 23 that "[b]y virtue of Regulation 7(5) that would include a scenario in which the degree of the pensioner's disablement had altered by virtue of his earning capacity improving"." [underlined emphasis added]*

[32] See Laws LJ's description of Cox J's judgment on this issue at paragraph [26] of his judgment.

7.132 *This is an interesting passage, since it makes clear that events which might alter earning capacity in a relevant way for the purpose of a review are not restricted to an improvement or deterioration in the injury alone but can include "external factors" such as the acquisition of new skills (a matter relied upon by the Home Office in Simpson in relation to the external factor of age, but without success).*

Crudace (English High Court, February 2012)

7.133 *The Crudace case – R (Crudace) v Northumbria Police Authority[33] – was a precursor to the Simpson litigation. In Crudace, the claimant was a former police inspector of the Northumbria force who was required to retire from the police force as a result of ill health in March 1991 when he was aged 47. When he retired, the claimant applied for and was awarded a Band 3 injury pension on the grounds that he had been permanently disabled as a result of an injury on duty and had a degree of disablement between 51% and 75%. In April 2008, the authority wrote to the claimant stating that it intended to conduct a review of his injury pension in April 2009 when he reached the age of 65. The authority subsequently wrote to the SMP inviting him conduct a review. The letter expressly referred to Home Office Circular 46/2004 and recommended that the claimant be placed in the 0-25% degree of disablement banding on the grounds that he had reached state pension age and no longer had an earnings capacity for the purpose of the Regulations. There was no medical examination of the claimant.*

7.134 *In February 2009, the SMP reduced the degree of disablement to Band 1, stating that:*

> *"I am advised that the Pensioner has reached State Retirement Age and therefore, in accordance with the Regulations, the Pensioner "no longer has an earning capacity for the purposes of the Police Injury Benefit Regulations". Northumbria Police has also determined that there is no "cogent reason" why the Pensioner should not, therefore, be considered to have 0% loss of earnings capacity and as a consequence of their injury, and should be placed in the 0-25% Degree of Disablement banding. I confirm that the above recommendations are consistent with the Regulations and I attach a revised Statement of Injury."*

7.135 *The claimant invited the police authority to agree, under regulation 32 of the English Regulations, to refer the matter back to the SMP to reconsider the February decision. In December 2010, that request was refused. Mr Crudace then sought judicial review. He contended that the SMP's decision had been fatally flawed as a matter of law and that he did not have the benefit of a review conducted in accordance with regulation 37 of the Regulations. He submitted, inter alia, that the 'cogent reason' test proposed in the Guidance was wrong in law; that it was not in regulation 37 and inappropriately sought to change both the burden and standard of proof as*

[33] [2012] EWHC 112 (Admin); [2012] All ER (D) 50 (Feb).

part of the review; it did not advise the SMP to ask whether there had been an alteration in the degree of disablement of the pensioner since the pension was awarded and/or the last review and failed to advise the SMP to ask himself whether any alteration was substantial.

7.136 *The English High Court (Judge Behrens sitting as a judge of the High Court) allowed the application for judicial review. The general conclusion reached by the judge was that the test proposed by the Home Office Guidance was not in accordance with what was required by the relevant regulation (regulation 37). Part of the claimant's case was a challenge to the Home Office Guidance itself. Although the judge was conscious of the fact that the Home Secretary was not participating in the proceedings to defend Circular 46/2004 (and was aware that she was doing so in the Simpson case, shortly to be heard) he nonetheless felt able to express a conclusion on the lawfulness of the test applied in the Guidance[34].*

7.137 *The judge's conclusion is set out at paragraph [32] of his judgment, which is in the following terms:*

> *"I have come to the conclusion that [counsel for Mr Crudace's] submissions on this point are correct. In my view the test proposed in the Guidance is not in accordance with reg 37. The SMP is not entitled to conclude that "in the absence of cogent reason" the pensioner's uninjured earning capacity is reduced to zero when he attains the age of 65. Rather, if the Police Authority refers the matter to him for review when the pensioner attains the age of 65 he must carry out a proper review in accordance with reg 37. Thus he must consider whether the degree of the pensioner's disablement has altered and if so whether the alteration is substantial."*

7.138 *Most of the more detailed reasoning in the judgment is devoted to other issues – such as who the correct defendant to the proceedings ought to be [35] , whether time for bringing the application for judicial should be extended[36], and whether the subsequent decision not to refer the claimant's case back for reconsideration was made by the correct person and/or on the correct basis[37]. The reasoning on what is (for present purposes) the central point, namely the basis on which the SMP's re-banding of Mr Crudace at age 65 was unlawful, is fairly limited. It might well be that the judge was conscious that the same issues were to be considered in further detail shortly by another judge of the High Court in the Simpson case.*

7.139 *However, Judge Behrens did indicate that the submissions made on behalf of Mr Crudace were correct. It seems to me that he was there referring back to the submissions he had recorded shortly before in paragraphs [28]-[29] of his judgment, in the following terms:*

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[34] See paragraphs [30]-[32] of the judgment.

[35] See paragraphs [62]-[70].

[36] See paragraphs [71]-[82].

[37] See paragraphs [83]-[96].

> *"[Counsel for Mr Crudace] has a number of criticisms of the Home Office Guidance which are set out in detail in paras 18 – 21 of his skeleton argument. He reminds me that under reg 7 the degree of disablement is the difference between the pensioner's uninjured and actual earning capacity. There is no justification for assuming (or assuming in the absence of cogent reasons) that his uninjured earning capacity is reduced to nothing at the age of 65. He points out that, in fact, there are a substantial number of people over the age of 65 in the labour market. The fact that a pensioner might choose to retire at the age of 65 does not mean that he has no earning capacity at that age. Thus he submits that the equation between "normal retiring age" and a diminution to zero of a pensioner's uninjured earning capacity involves flawed logic.*

He also submits that the "cogent reason" test proposed in both sets of Guidance is wrong in law. It is not in reg 37 and inappropriately seeks to change both the burden and standard of proof as part of the review. Thus he submits that the Guidance seeks to divert the SMP from the test in reg 37. It does not advise the SMP to ask whether there has been an alteration in the degree of disablement of the pensioner since the pension was awarded and/or the last review and fails to advise the SMP to ask himself whether any alteration he finds is substantial."

7.140 *The key flaws identified in the Home Office Circular in Crudace, therefore, appear to me to be the adoption of an assumption that a person who has attained age 65 has no earning capacity when that might well not be the case and, relatedly, the requirement on the part of a former officer in receipt of an injury pension to provide a cogent reason as to what that is not so in his case. The nub of the Crudace authority therefore seems to me to be a requirement on the part of the SMP in the course of a review to look at the officer's individual case without applying any such assumption (what the judge refers to in paragraph [32] of his judgment as "a proper review"). Crudace is of assistance on this point but gives little guidance as to what "a proper review" should look like or entail, other than a restatement of the statutory test that what must be considered is whether the degree of the pensioner's disablement has altered and, if so, whether the alteration is substantial. Some further assistance on this issue can obviously be found in the case of Laws (discussed above) and more recently in the Simpson judgment.*

Trendell (English High Court, February 2012)

7.141 *Although perhaps not one of the central authorities touching upon issues which arise in this review, it is also worth mentioning the case of Trendell – Trendell v The Police Medical Appeal Board[38] – which is another relatively recent decision of the English High Court in relation to the application of the English Regulations.*

[38] [2012] EWHC 341 (Ch).

7.142 *Mr Trendell, the claimant and appellant, served as a police officer in the Metropolitan Police Service from 1982 until his retirement on grounds of permanent disability in 1997. Mr Trendell's disability was caused by two injuries sustained in the execution of his duty. At the time of his retirement, Mr Trendell was in receipt of the top scale point of a sergeant's pay scale and had an exemplary disciplinary record.*

7.143 *On his retirement, Mr Trendell became entitled to an injury pension. He was assessed by the SMP to have a 30% degree of disablement. In 2000, Mr Trendell's degree of disablement was first reviewed but was not found to have substantially altered and his injury pension remained the same. In June 2006, his degree of disablement was reassessed by the then current SMP and his degree of disablement reduced to 13%. Ultimately, (after an earlier decision of the PMAB was quashed on judicial review and the matter remitted back for a further hearing), the PMAB upheld Mr Trendell's appeal and found that his degree of disablement was 49.26%.*

7.144 *Mr Trendell then made a complaint to the Pensions Ombudsman under the provisions of section 146 of the Pension Schemes Act 1993. By letter dated 1 July 2011, the Pensions Ombudsman decided not to uphold Mr Trendell's complaint and he appealed against the PO decision to the High Court under section 155 of the 1993 Act. The two central grounds of challenge on which he relied were that his degree of disablement as found by the Board was too low because (a) his pensionable police pay should have included a competency related threshold payment (CRTP) which had been available to sergeants as a pay enhancement since 1 April 2003; and/or (b) his earning capacity was assessed by reference to inappropriate statistics, namely particular figures in the 2008 ASHE Survey[39].*

7.145 *The judge dispensed relatively easily with the issue of the CRTP payment, since it was not available to the claimant at the time of retirement and was therefore not considered relevant to his uninjured earning capacity. The more interesting element of the judgment for present purposes is the discussion of the use of ASHE figures.*

7.146 *As to the general approach to the assessment of degree of disablement, the judge said this (at paragraphs [12]-[13] of his judgment):*

> *"Where the assessment of the degree of disablement is made at the same time as, or immediately after medical retirement, no conceptual difficulty arises. The decision maker has to assess the person's current earning capacity and compare it with the rate of pay earned when last serving. The loss in earning capacity is then expressed as a*

[39] The Board used the figures in respect of males in *full time* work, including overtime, reduced *pro rata* for a person only able to work 30 hours a week. Mr Trendell did not complain about the finding that he was able to work 30 hours a week; but contended that the ASHE figures for the hourly rate for *part time* work, multiplied by 30, should have been used to assess his earning capacity (or, alternatively, the ASHE figures for full time work, *excluding* overtime). The effect of using the wrong figures was, Mr Trendell complained, to overstate his earning capacity.

percentage of that rate, which will determine into which category of the degree of disablement in the first column of the above table the person falls.

On a review under Regulation 37 of PIBR 2006, the person's degree of disablement is reassessed as at the date of the review. There is no conceptual difficulty about assessing the person's then current earning capacity. But what is that to be compared against in order to assess the then current loss of earning capacity? In order to compare like with like (and in particular to take account of inflation), there would seem to be an implicit requirement to revalue, as at the date of the review, the person's pensionable pay earned as at the date of retirement, but the PIBR 2006 are silent on the point."

7.147 *The judge went on to comment further on the fact that the English Regulations were – as are our 2006 Regulations – silent on precisely by what methodology this assessment was to be undertaken:*[40]

"As the Pension Ombudsman stated in her decision, the PBIR 2006 do not prescribe a set method for the decision maker to follow in assessing a person's earning capacity. Although the Guidance does elaborate on the methodology which should be used, it sheds no real light on the particular points made by Mr Trendell on the ASHE issue, although in paragraph 13 of Section 5 the following is stated: "It is reasonable to use as a starting point the level of earnings in the UK as a whole." The ASHE survey contains various statistics of earnings grouped variously by gender, full time/part time, annual/monthly/weekly/hourly rates, including/excluding overtime and private/public sector. There is no requirement that the Board use a particular set of statistics and it seems to me that the Board can properly use such statistics in any given case as seem reasonable. The Board used, as the basis of their calculation of Mr Trendell's indicative annual salary, the figure in ASHE showing the median gross annual earnings (including overtime) for full time men in the tax year ending 5 April 2008. There is no equivalent annual figure in ASHE for median annual earnings (excluding overtime), only the hourly rate to which I have referred in the preceding paragraph. Although the Board could also reasonably have adopted this hourly rate and calculated from it an indicative annual salary for Mr Trendell (rather than, as they did, take the annual figure and calculate pro rata an indicative salary on the basis of a 30 hour week as opposed to a 39.5 hour week), I consider that the method used by the Board in this case was well within acceptable parameters of reasonableness.
Accordingly, I find that on the ASHE issue there is no arguable error of law on the part of the Pension Ombudsman…"

7.148 *There are a number of brief points which can be made about this judgment. First, it confirms the position discussed in paragraphs 4.60 – 4.62*

[40] Paragraphs [39]-[40] of the decision.

and 4.72 above that the calculation of a former officer's uninjured earning capacity is a static rather than dynamic assessment, simply factoring up (for inflation purposes) the salary earned when the officer retired, rather than considering what additional monies might have been paid to the officer (in this case, the CRTP supplement) had he continued to serve.

7.149 *Second, although there was no challenge to the use of ASHE figures per se in this case[41], and the claimant's complaint related merely to the precise figures which were used from the survey, the judge appears to have been content that the use of ASHE figures in the course of a detailed calculation of percentage disablement was lawful. This is consistent with the view I have expressed above at paragraph 7.57 that the use of ASHE is not unlawful per se, at least as far as officers under age 65 are concerned.*

7.150 *Third, however, this case points up the very type of issue which has led me to the view that the nature of the detailed calculation required when using the ASHE approach is such that it may well increase, rather than reduce, the scope for argument. There will plainly be other cases where, as here, there is an argument to be had as to which figures from the ASHE Survey should be used and which are the most appropriate. Although the judge in Trendell approaches the issue on the basis that, in the absence of any prescriptive approach contained within the Regulations themselves, the question for a reviewing court is simply whether the medical authority adopted an approach which was reasonable, I still consider that considering this type of argument and making this type of judgment is far removed from what the Regulations would genuinely have intended the medical practitioner to do in the determination of one of the "medical questions" referred to him for decision.*

Haworth (English High Court, May 2012)

7.151 *The Haworth case – R (Haworth) v Northumbria Police Authority[42] – was another case arising out of a review of an IOD award. The claimant was a retired police officer and had been in receipt of an IOD pension since 1996. In 2006, the claimant's pension had been reviewed by the PMAB. The Board's decision, under regulation 37 of the English Regulations, had the effect of substantially reducing the claimant's pension.*

7.152 *In October 2010, the claimant sought agreement from the defendant for her case to be referred back to the Board for reconsideration. In December 2010, the defendant refused the claimant's request, stating, inter alia, that the decision of the Board had been made in 2006 and that if the claimant had not wanted the consequences of the decision to apply, she had had open to her avenues to properly challenge the decision and, by not challenging the Board's decision at that time, the claimant had accepted the findings of the Board. The defendant further stated that it was important that final decisions remained final and that the review and appeal process would take time and would cost considerable sums of public money to administer.*

[41] And, therefore, this issue has not been determined by the case.

[42] [2012] EWHC 1225 (Admin); [2012] All ER (D) 137 (May).

This view was taken even though, in the proceedings, it seemed to be accepted on the part of the authority that the decision in Ms Haworth's case may well have been taken wrongly in light of the subsequent interpretation of the Regulations in Turner and Laws (since it was clear, inter alia, that causation had been impermissibly revisited).

7.153 *The claimant applied for judicial review of that decision. She contended, inter alia, that the provision within regulation 32(2) of the Regulations, enabling reconsideration, should be construed as a free standing provision free of any implied time constraints, intended to be a mechanism to enable mistakes, whether of law or fact, which had deprived a police officer of the pension to which he was entitled under the Regulations, and which otherwise could not be put right, to be put right. She further contended that the defendant, in focusing its decision only upon its own financial position and the passage of time, without paying any consideration to the merits of the claim, had used its discretionary power for a purpose inconsistent with the purpose of the Regulations, namely, to ensure that the individual was paid the pension to which she was lawfully entitled. Finally, she contended that delay in seeking such a reconsideration is relevant only to the extent that such delay had prejudiced a fair resolution of the issues that had been sough to be raised on reconsideration.*

7.154 *In referral[43], the court ruled that:*

> *(1) In the light of the statutory scheme as a whole, there was no reason not to construe regulation 32(2) of the Regulations as in part a mechanism to correct mistakes, either as to fact or as to law, which had or might have resulted in an officer being paid less than his full entitlement under the Regulations, which could not otherwise be put right. A refusal to consent to a reconsideration under regulation 32(2) of the Regulations on the ground that the decision in question was a final one cannot lawfully stand with the very provisions of that regulation itself. Moreover, regulation 32(2) expressly contemplated that there could be more than one reconsideration by the medical authority. Finally, it was not lawfully open to a police authority to have refused a retired officer its consent to refer a final decision back to a medical authority for reconsideration under regulation 32(2) simply on the grounds of delay, even inordinate delay, without any consideration of the underlying merits.*
>
> *(2) The defendant's decision not to consent to a reconsideration of the board was flawed on conventional public law grounds for a number of reasons: (a) in failing to have any regard to the underlying merits of the claimant's application, and in refusing consent regardless of the strength of those merits, the defendant's decision had not been in accordance with the statutory purpose for which the discretionary power under regulation 32(2) was given; (b) the considerations expressly relied upon by the respondent to justify a refusal of consent*

[43] Using the headnote from the All ER Digest report of the case.

had not been, in themselves, relevant considerations; and (c) in so far as the defendant had relied upon the anticipated costs to it of having to meet any increase in pension arising from the proposed reconsideration, that anticipation had not been a lawful basis upon which to refuse consent.

7.155 *Having described the Laws authority as "the now leading case dealing on the approach to reviews under the Regulations" at paragraph [12], King J summarized the current legal position in relation to reviews (in paragraph [24] of his judgment) as follows:*

> *"… it is now established that such a review can be concerned only with the question as to whether there has been <u>any substantial alteration in the degree of disablement since the last review</u>. Upon any such review the starting point on disablement has to be taken as that reached by any previous review as a matter of substance and a new review cannot lawfully seek to re-open questions on disablement, and in particular on causation, already determined by earlier decisions of the material medical authority." [underlined emphasis added]*

7.156 *King J goes on to summarise the statutory scheme in a lengthy section of his judgment which provides a helpful overview of the main procedural provisions (at paragraphs [29] onwards]). Returning to the issue of reviews, he further explains in paragraphs [42]-[43] that:*

> *"Such a review is by the very wording of reg 37(1) concerned only with whether the degree of the pensioner's disablement has substantially altered since the previous decision of a material medical authority. Hence under reg 30(2) on the occasion of such a review it is only question (d) which is to be referred under reg 30. <u>Given that that degree is defined as the degree to which earning capacity has been affected by the qualifying injury, that alteration may come about as a result of an improvement in the underlying medical condition for example or as a result of external factors such as the sudden availability of a job but the critical principle is that the review is concerning itself with changes in circumstances that have occurred since the last relevant decision and is looking to see if as a result there has been any alteration in degree of disablement which is substantial</u>.*
>
> *It might be thought self evident in these circumstances that on any review, the medical authority can not go outside the narrow question referred to it and cannot revisit prior questions, for example the question relating to causation under (c) ("whether the disablement is the result of an injury received in the execution of duty") arrived at on the initial assessment or revisit the degree of disablement arrived at on a previous occasion, be it the initial assessment or the last review, by revisiting the clinical judgments taken on that previous occasion. However – critically for present purposes – that was only made crystal clear by the Court of Appeal decision in Laws…" [underlined emphasis added]*

7.157 *King J accepted that the power of the court or tribunal to refer a matter back to a medical authority under regulation 32(1)[44] was for the purpose of ensuring as far as possible that decisions of a medical authority are made on a proper evidential basis (see paragraph [48]).*

7.158 *In relation to the core of the case, the authority's refusal to consent to a referral back under regulation 32(2)[45], King J held[46] that it is not lawfully open to a police authority to refuse a retired officer its consent to refer a final decision back to a medical authority for reconsideration simply on the grounds of delay, even inordinate delay, without any consideration of the underlying merits of the matters which the former officer seeks to pursue on such a consideration. Such an approach imposes upon what on its face is a wide power and unfettered discretion granted to it a time limitation which could not properly be implied.*

Blakely (Northern Irish High Court, February 2013)

7.159 *In the Blakely case[47], the applicant sought judicial review of a decision of the Board to set a start date for his injury pension in 2009, the date when he made his retrospective application, rather than the date of his retirement in 2006, in accordance with regulation 6(7) of the 2006 Regulations[48]. The applicant had retired from the PSNI in the normal way but relied on hearing loss at a later stage.*

7.160 *After leave was granted, the Board wrote to the applicant accepting that it could not simply impose the date of application for an injury pension as the date of commencement of payment and that it now proposed to refer his case to a medical expert to obtain an opinion on precisely when he had first become disabled. The applicant, however, objected to this course, claiming that it would be ultra vires the Regulations and that they required his injury pension to be paid from the date of retirement. He relied on medical evidence which suggested that the injury must have occurred during his police service.*

7.161 *Treacy J agreed with the Board's submission that "the first question must be whether the applicant is permanently disabled and, if so, the date when this permanent disablement commenced"[49]. It is only if there is some attempt to assess the date of disablement that regulation 10(2) can be properly applied. Treacy J went on to say[50]:*

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[44] Our regulation 31(1) in the 2006 Regulations.

[45] Our regulation 31(2) in the 2006 Regulations.

[46] At paragraphs [90]-[91].

[47] *Re Blakely's Application* (unreported, Treacy J, 8 February 2013).

[48] Which provides that "where a person has retired before becoming disabled and the date on which he becomes disabled cannot be ascertained, it shall be taken to be the date on which the claim that he is disabled is first made known to the Board".

[49] See paragraph [14] of the judgment. The judge returns to this issue in paragraph [23] in terms which perhaps make more clear that these are, in fact, two separate or sequential questions.

[50] At paragraphs [15]-[16].

> *"Accordingly in my view the [Board] must seek to determine the date of disablement and is quite entitled in discharging that task to seek medical evidence to assist in reaching what is essentially a medical question. Fairness dictates that this is a process in which the applicant must be appropriately involved. Upon receipt of all relevant evidence and consideration of the issue, the [Board] will either determine the date or, if same cannot be ascertained rely upon Reg 6(7).*
>
> *If the applicant refused to submit to medical examination, then the [Board] would have to make its decision on the available evidence and may conclude that the actual date of disablement could not be ascertained in which case the date of the claim would become, by default, the relevant date."*

7.162 *The judge then referred to article 29 of the Regulations which "makes clear" that the question whether a person is entitled to any, and if so what, awards under the Regulations "shall be determined in the first instance by the Board"[51]. This included a determination of when the applicant became permanently disabled. Although this was "essentially a medical question" it was not a matter which was required to be determined by an SMP or IMR as a medical question which should be referred to them under regulation 29(2)[52]. Accordingly, the Board had to make the determination on the basis of the medical evidence available to it.*

Hawthorne (Northern Irish High Court, July 2013)

7.163 *In Re Hawthorne's Application[53] the applicant challenged two decisions made under the 2006 Regulations relating to the award of an injury on duty pension namely: (a) a decision of the NIPB and/or DOJ whereby they refused to refer a determination by the IMR to an appeal tribunal under regulation 33 ('the appeal decision'); and (b) the decision of the IMR himself dated 28 April 2011, whereby he confirmed that the applicant remained 100% disabled, but that only 10% of his current disablement and loss of earning capacity were as a result of the injury on duty ('the medical decision).*

7.164 *At the conclusion of the substantive hearing the Court announced its decision but gave detailed reasons later in a written judgment. The Department had conceded that the applicant did have a right of appeal to an appeal tribunal and that it was a matter for it, the DOJ, under regulation 33 to convene an appeal. The Board took a different view but Treacy J accepted the applicant's and Department's submission that a right of appeal under regulation 33 did exist. As to the medical decision, the Court rejected the challenge to it.*

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[51] See paragraph [17] of the judgment and, to like effect, paragraph [23].

[52] See paragraphs [20] and [24] of the judgment.

[53] [2013] NIQB 76.

7.165 *The issue for the Court seems to have been essentially whether, on reducing the applicant's injury pension on a review, the SMP and IMR had unlawfully re-visited causation or had properly apportioned the causes of his disablement (although the matter is not described in quite this fashion). Ultimately the Court concluded[54] that, on the particular facts of the case, unlike the reviewing medical authority in Laws the reviewing doctors in the present case had not sought to undermine the original clinical findings. On the contrary, as required by regulation 35, they had simply addressed their minds to the statutory question as to whether the degree of the pensioner's disablement had substantially altered and the extent to which his original back injury is now contributing to his disability (finding, in essence, that it had got much better). The judge concluded that this was in accordance with regulation 6(5) which provides that the degree of a person's disablement must be determined by reference to the degree to which his earning capacity has been affected as a result of a relevant injury.*

7.166 *At paragraph [25] of the judgment, commenting on the review provisions in regulation 35, Treacy J said this:*

> *"The finality of the decisions of the SMP/IMR on the referred questions is subject to the continuing duty of review at suitable intervals under Reg 35. These interlocking statutory provisions are plainly intended to introduce a degree of finality whilst at the same time ensuring that officers are not unjustly enriched by continuing to receive a pension which is no longer justified. Equally if the degree of disablement has substantially altered in the other direction it is only fair and proper that the pension should be revised accordingly. Reg 35 is on any showing a vital safeguard for police officers and the general community in ensuring fairness and probity in the disbursement of such expenditure."*

7.167 *Returning to the appeal decision, Treacy J held[55] that the Department was correct to concede that the impugned decision revising the pension was a decision of the Board and accordingly subject to an appeal under regulation; the decision having been arrived at by the Board after the degree of disablement had been referred to the SMP/IMR. He continued:*

> *"Reg 35 makes it clear that the ultimate decision maker in revising the pension is the Board. When a medical question has been referred to a medical referee (SMP or IMR) their decisions on the questions referred are final. But the primary decision maker remains the Board notwithstanding the finality of the medical referees decision. As a person aggrieved by a relevant decision of the Board the applicant enjoys a clear right under Reg 33 to appeal the impugned decision in accordance with that provision."*

7.168 *It is therefore established that there is a right of appeal available to an aggrieved officer under regulation 33 against a decision of the Board on a*

[54] At paragraph [28].

[55] At paragraph [29].

review[56]; but in the course of such an appeal, pursuant to regulation 34(2), subject to a referral back to the medical authority by the tribunal under regulation 31(1), in the regulation 33 appeal "the tribunal shall be bound by any final decision of a medical authority within the meaning of regulation 31". Accordingly, I find it difficult to see how the appeal against the decision under regulation 33 would assist Mr Hawthorne in his case. Although he could appeal to the tribunal, he would be 'stuck' with the IMR finding which he had also sought to challenge, which would remain binding on the tribunal. All that he could perhaps hope to do is persuade the tribunal that the evidence before the IMR who had given the final decision was inaccurate or inadequate, so prompting the tribunal to refer the IMR's decision back to him for reconsideration in the light of such facts as the tribunal may direct under regulation 31(1).

[56] Although this is not entirely clear from the wording of regulation 33(1), which might be thought to apply only to questions of initial entitlement rather than decisions on review. However, this is unlikely to be in accordance with the general purpose of regulation 33(1) and, more particularly, the availability of an appeal against a "refusal of the Board to admit a claim to receive… a higher award than that granted" might be thought to cover a revision of an injury pension by the Board under regulation 35(1). The precise reasoning of the judge on this issue is not clear; and the case could, in my view, have been decided the other way on a more strict wording of regulation 33(1).

SCHEDULE 3 OF THE PSNI AND PSNI RESERVE (INJURY BENEFIT) REGULATIONS 2006

PSNI Pensions Branch process the payment of all Injury on Duty Awards on the basis of the following table which is set out in *Schedule B, Part V of the 1988 Regulations* and *Schedule 3 of the 2006 Regulations*:-

Degree of disablement	Gratuity expressed as % of average pensionable pay	Minimum income guarantee expressed as % of Average Pensionable Pay[57]			
		Less than 5 years' service	*5 or more but less than 15 years' service*	*15 or more but less than 25 years' service*	*25 or more years' service*
(1)	(2)	(3)	(4)	(5)	(6)
Band 1 25% or less (slight disablement)	12.5%	15%	30%	45%	60%
Band 2 More than 25% but not more than 50% (minor disablement)	25%	40%	50%	60%	70%
Band 3 More than 50% but not more than 75% (major disablement)	37.5%	65%	70%	75%	80%
Band 4 More than 75% (very severe disablement)	50%	85%	85%	85%	85%

[57] Your Average Pensionable Pay is the amount you earned as a police officer in your final 12 months of service or the most favourable earnings in a 12 month period within your last 3 years of service, whichever is higher.