

## Ombudsman's Determination

<b>Applicant</b>	Mr Raymond McSorley
<b>Scheme</b>	Police Injury Benefit Scheme (Northern Ireland) (the <b>Scheme</b> )
<b>Respondent(s)</b>	Northern Ireland Policing Board ( <b>NIPB</b> )

### Complaint Summary

Mr McSorley's complaint about the NIPB, the scheme manager, is that he is not being paid the correct percentage of disablement pension and that the correct percentage should be backdated to 2005, when he first started to receive an injury benefit.

### Summary of the Ombudsman's determination and reasons

The complaint should partly upheld against NIPB because even though they did not deal with Mr McSorley's original appeal in accordance with the regulations, they did so when they dealt with his second appeal.

## Detailed Determination

### The Regulations

The applicable regulations are the Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2006 (the **2006 Regulations**). Regulation 30 and schedule 6 of these regulations say:

“Appeal to independent medical referee

30. – (1) Where a person is dissatisfied with the decision of the selected medical practitioner as set out in a report and certificate under regulation 29(5), he may, within 28 days after he has received a copy of that report and certificate or such longer period as the Board may allow, and subject to and in accordance with the provisions of Schedule 6, give notice to the Board that he appeals against that decision.

(2) In any case where within a further 28 days of that notice being received (or such longer period as the Board may allow) that person has supplied to the Board a statement of the grounds of his appeal, the Board shall notify the Secretary of State accordingly and the Secretary of State shall appoint an independent medical referee to decide.

(3) The decision of the independent medical referee shall, if he disagrees with any part of the report and certificate of the selected medical practitioner, be expressed in the form of a report and certificate of his decision on any of the questions referred to the selected medical practitioner on which he disagrees with the latter’s decision, and the decision of the independent medical referee shall, subject to the provisions of regulations 31, be final.

#### SCHEDULE 6 – MEDICAL APPEALS

1. Every notice of appeal under regulation 30(1) and statement of the grounds under regulations 30(2) shall be in writing.

2. On receiving a notice of appeal against a report and certificates issued under regulation 29 and the appellant’s statement of grounds for appeal, the Board, unless regulation 31 (2) applies, shall forward to the Secretary of State two copies of those documents and all other documents determined as necessary by the Secretary of State.

3.-(1) The independent medical referee shall appoint a time and a place for hearing the appeal, at which he may interview or examine the appellant, and for any such further hearings as he may consider necessary and shall give reasonable notice thereof to the appellant and Board.

...”

**Material facts**

1. Mr McSorley was awarded an injury benefit in September 2005. At that time, his degree of disablement was assessed at 40% (Band 2). He contacted the NIPB in November 2008 and asked for a review of his award including the introduction of a new condition – a skin complaint.
2. On the 21 April 2009 the Selected Medical Practitioner (**SMP**), Dr Zubier, decided that Mr McSorley did not meet the criteria for an injury benefit award and as a result payment of his benefits were stopped.
3. It was later pointed out to Dr Zubier by the NIPB that at review the SMP may only review the percentage disablement award, and should not reopen the case and consider the original decision. The object of the review process is to assess any change in the former police officer's condition and recalculate the award.
4. On 12 August 2010, Dr Zubier wrote to the NIPB saying that he was altering his original decision on the case. He concluded that Mr McSorley was permanently unfit for his normal police duties and based on Mr McSorley's current level of functioning, and given his long history of unemployment, he could be considered unfit for all work.
5. Dr Zubier issued a report and certificate that Mr McSorley's degree of disablement was 10% (Band 1) and this was to be backdated to 1 June 2009.
6. Mr McSorley appealed the decision to reduce the degree of his disablement and to backdate it to 1 June 2009.
7. On 7 October 2010 the NIPB wrote to Mr McSorley's solicitors saying that his appeal was being forwarded to the Department of Justice (**DoJ**) for consideration. They said that they were requesting a list of doctors and/or consultants involved with the case and would forward the necessary papers to the DoJ who will arrange for the appointment of an independent medical referee (**IMR**) in accordance with part 4, section 30 of the 2006 Regulations. They added that it would be necessary for a SMP to prepare a medical report for consideration on appeal and asked for the completion of a Medical Report Consent Form (Appeal 2).
8. On 23 August 2013 the IMR, Dr Scott, said that he was upholding the SMP's decision. In his report Dr Scott said that the report was based on an interview with Mr McSorley on 21 February 2012, plus a review of the file submitted by NIPB. Dr Scott commented that he agreed with the views expressed in Dr Zubier's report of 12 August 2010 to reduce Mr McSorley's percentage disablement award from 40% to 10%. He also agreed with other reconsideration reports confirming that the award should remain at 10%.
9. Mr McSorley asked for the IMR to reconsider his decision, which the IMR did, but this did not alter the findings.

**Summary of Mr McSorley's position**

10. He was diagnosed as suffering from a skin condition which was related to the injury he suffered while on duty on 20 April 1982.
11. He contacted the NIPB in November 2008 about his skin condition and was told that Dr Zubier wanted to see evidence of this. Dr Zubier subsequently cancelled his injury benefit.
12. Dr Zubier first considered his appeal as an application for an injury benefit and therefore unlawfully cancelled his pension. He was given 10% to make Dr Zubier's decision appear legal.
13. He does not think that there was a second appeal as he went from Dr Zubier to Dr Scott. Dr Scott agreed with Dr Zubier's decision.
14. He says that he is owed £50,000 by NIPB which includes loss of injury benefit of £6,000 a year and his maintenance grant of £21,000.
15. He suffers from post-traumatic stress disorder and what the NIPB did was unlawful and illegal.

**Summary of NIPB's position**

16. The original assessment of Mr McSorley's appeal and subsequent reconsideration was carried out in accordance with the regulations.
17. Mr McSorley's appeal was considered under regulation 30(1) of the 2006 Regulations. Their practice at the time, particularly where new evidence was provided, was to refer the matter back to the SMP for reconsideration. If the SMP altered their opinion the appellant would be notified and asked if they wished to continue with their appeal. If the SMP did not alter their opinion the appeal proceeded and the Board would submit all papers to the DoJ.
18. On the appeal forms Mr McSorley completed he gave permission for the SMP to provide a report on his medical conditions. He was also provided with a copy of their guidance booklet which advised appellants that if new information is provided as part of the appeal the case may be referred back to the SMP for a review of their assessment in light of the new information.
19. Mr McSorley was informed through his representative of the reconsideration and no objections were raised in respect of this process. Therefore, he was aware and complied with the reconsideration by the SMP.
20. They accept that Dr Zubier did not act in accordance with the regulations and when this was brought to their attention, he was asked to reconsider his decision.
21. Regulation 31(2) of the 2006 Regulations is the only mechanism within the regulations by which they can correct a SMP's error.

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22. Mr McSorley subsequently appealed the 10% award and the IMR, Dr Scott, upheld Dr Zubier's decision in August 2013. Dr Scott also carried out a reconsideration in May 2014, but did not change his opinion.
23. Mr McSorley has not suffered any adverse consequence as a result of the reconsideration, particularly given that Dr Scott upheld Dr Zubier's decision to award 10%.
24. Under regulation 29(5) of the 2006 Regulations the SMP report and the certificate is final, subject to regulations 30 and 31. The IMR's report issued in August 2013 replaced the SMR's report as the final decision under regulation 29(2)(d) in Mr McSorley's case and therefore took effect from 12 August 2010.
25. The appeal in August 2013 was not a separate appeal but a continuation of the appeal raised by Mr McSorley in May 2009 albeit the appeal grounds were revised from challenging the removal of the award to appealing the percentage disablement awarded.
26. There was some delay (amounting to at least 12 months) on the part of Mr McSorley in the completion of his appeal, namely:
  - All completed appeal forms were not received from Mr McSorley's representative until 30 December 2010 nearly three months after they were issued.
  - Further medical evidence was not forwarded by Mr McSorley's representative until seven months after receipt of the completed appeal forms.
  - They submitted appeal papers to the DoJ on 10 October 2011 after which additional medical evidence was submitted by Mr McSorley's representative, further delaying the arrangement of an IMR appointment.
  - Mr McSorley did not attend a number of IMR appointments due to illness. While they understand he was unwell during this period it added delay to the appeal process (from February to November 2012) and was outside their control.
27. As part of the internal dispute resolution process, they made an offer to Mr McSorley to pay him the difference between the Band 1 and Band 2 award between 1 June 2009 and 12 August 2010. He was instructed to put in writing whether he wished to accept this offer but has not done so. It remains their position that a payment for the difference between Band 1 and Band 2 be made (totalling £2,761.58).
28. With regard to Mr McSorley's assertion that he is owed approximately £50,000 for his injury on duty (IOD) award, they consulted with PSNI Pensions Branch who are responsible for paying IOD awards. PSNI Pensions Branch advised them that his annual IOD award, prior to the June 2009 review, totalled £5,170.08. Following reduction to Band 1 in August 2010, his current annual IOD award is £3,266.42.

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29. Arrears of £4,131.86 were paid to him for Band 1 between 1 June 2009 and 12 August 2010. The payment for the difference between Band 1 and Band 2 between June 2009 and August 2010 is £2,761.58. Therefore, it is unclear how he has calculated the £50,000 figure.
30. In relation to the role of the IMR, the appeal process is administered by the DoJ to ensure independence. Dr Zubier and Dr Scott did not confer at any stage during the appeal process and Dr Scott carried out his own assessment of the evidence provided as part of the appeal, including an examination of Mr McSorley, to determine if he agreed with Dr Zubier's decision.
31. Mr McSorley was examined by a Consultant Gastroenterologist, Dr Collins, and Consultant Dermatologist, Dr Alderdice. Dr Alderdice's report is referenced by Dr Scott in pages 3-5 of his own report and was enclosed with copies forwarded to Mr McSorley and then by the DoJ. Therefore, Dr Scott did take into account Dr Alderdice's report at the time of assessment. In any case Mr McSorley's subsequent request for reconsideration by Dr Scott was agreed by them. Dr Alderdice's report was forwarded to Dr Scott for reconsideration and clarification, but it did not alter his opinion.

## **Conclusions**

32. NIPB say that Mr McSorley's appeal in August 2013 is not a separate appeal, but a continuation of the May 2009 appeal with the appeal grounds revised. I am unable to agree with this. The original (May 2009) appeal was a review of the 40% award he was given in 2005 which he felt was low taking into account his new condition – his skin complaint. The second appeal was against the decision to reduce his degree of disablement from 40% to 10%.
33. I would agree that under the 2006 Regulations the IMR's report issued in August 2013 replaced the SMR's report. However, I cannot agree that the IMR's report took effect from 12 August 2010.
34. Regulation 30(1) of the 2006 Regulations states that if a person is dissatisfied with the decision of the SMP, they may within 28 days after receiving a copy of the SMP's report or certificate, or such longer period as the NIPB may allow, appeal that decision. Mr McSorley's injury benefit was awarded to him in 2005 and therefore his appeal is outside the 28 day period. However, NIPB have discretion to allow a longer period if they wish.
35. Under schedule 6 of the 2006 Regulations on receiving Mr McSorley's appeal notice, NIPB should forward two copies of his grounds for appeal to the Secretary of State, and all other documents requested by the Secretary of State, and the IMR should appoint a time and a place for hearing the appeal. NIPB say that their practice at the time he made his original appeal was to refer the matter back to the SMP for reconsideration. This is not in accordance with the 2006 Regulations.

36. When Mr McSorley made his original appeal, it was passed on to a SMP, Dr Zubier, who decided that his benefit should be stopped. Even though Dr Zubier subsequently (in August 2010) changed his decision and decided that Mr McSorley's degree of disablement should be reduced to 10% and backdate to 1 June 2009; NIPB's failure to deal with the original appeal in accordance with the 2006 Regulations is maladministration.
37. I do not dispute that Mr McSorley had given his permission, when he completed the appeal forms, for the SMP to provide a report on his medical conditions; or that he was provided with a copy of NIPB's guidance booklet which advised him that if new information is provided as part of the appeal the case may be referred back to the SMP for a review of their assessment in light of the new information. However, the provisions of the 2006 Regulations would overrule the guidance booklet and there is nothing in the former document which says that a case may be referred back to the SMP for review if new information is provided.
38. NIPB say that there were delays on the part of Mr McSorley's representative in the completion of his appeal. The delays that they have mentioned all occurred after August 2010, at the time of the second appeal was being considered. As NIPB had failed to deal with original appeal in accordance with the 2006 Regulations, the decision to reduce his pension should not have come into effect until Dr Scott's report was issued. If there were delays by Mr McSorley's representative during the second appeal, then NIPB should have chased them for the necessary forms and evidence at that time.
39. Mr McSorley's second appeal made in August 2010 was considered in accordance with the provisions of schedule 6 of the 2006 Regulation. In his report the IMR, Dr Scott, agreed with Dr Zubier's decision that Mr McSorley's degree of disablement should be reduced to 10%. Consequently, I am unable to find maladministration in the consideration of the second appeal. However, as Dr Scott's report was not issued until August 2013, Mr McSorley's degree of disablement should not have been reduced to 10% before that date. In summary, I find that there was maladministration by NIPB in considering Mr McSorley's original appeal but none in considering his second appeal. Due to the fact that the original appeal was not considered in accordance with the 2006 Regulations, the decision made to reduce his degree of disablement should not come into effect until the report on the second appeal was issued, ie August 2013.
40. In addition, I recognise that Mr McSorley has suffered non-financial injustice, in the form of distress and inconvenience, and I therefore have made an appropriate award of compensation for this.

**Directions**

41. I direct that, within 28 days of the date of this determination, NIPB shall pay Mr McSorley a lump sum equal to the difference between a Band 1 and a Band 2 injury benefit between 1 June 2009 and 23 August 2013 plus simple interest calculated in accordance with the rate declared from time to time by the reference banks on each instalment from the due date of each payment to the actual date of payment.
42. I also direct that, within 28 days of the date of this determination, NIPB shall pay Mr McSorley £300 as compensation for the non-financial injustice he has suffered.

**Jane Irvine**

Deputy Pensions Ombudsman  
20 May 2015