Case No: A2180102

IN THE CROWN COURT sitting at Leeds

Date: 10/04/2019

Before :

HER HONOUR JUDGE BELCHER

- -

Between :

ANGELA McLOUGHLIN	**Appellant**
- and -	
THE CHIEF CONSTABLE OF WEST YORKSHIRE	**Respondent**

- -

- -

Mr David Lock QC (instructed by **Haven Solicitors**) for the **Appellant**
Mr Ian Skelt (instructed by **West Yorkshire Police Legal Services**) for the **Respondent**

Hearing dates: 21 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HER HONOUR JUDGE BELCHER

Her Honour Judge Belcher :

1. In this matter the Appellant, Angela McLoughlin, appeals to this Court pursuant to Regulation 34 Police (Injury Benefit) Regulations 2006 ("the 2006 Regulations"). She appeals the refusal by the Respondent, the Chief Constable of West Yorkshire, to backdate her increased pension award so that it covers the period from her retirement on 18 December 1983 to November 2007, the latter being the date from which the increased pension award has been paid. References in this judgment to the appeal bundle will be by way of tab number and page number, for example [3/23]. References in this judgment to the authorities' bundle will be by way of tab number and page number, but with the prefix "AB" to distinguish the bundle, for example [AB 2/19].

2. During the period covered by this appeal there have been three different sets of relevant regulations, namely the Police Pensions Regulations 1987, the Police Pensions Regulations 1973 and the 2006 Regulations. Each set of new regulations provided that anything done under the previous regulations should have effect as if done under the under the new regulations. Counsel are agreed that the 2006 Regulations, therefore, effectively cover all issues in the case and that in deciding the issues I can properly do so by reference to the 2006 Regulations only. All further references in this judgment to "the Regulations" are, therefore, references to the 2006 Regulations.

The Facts

3. Before setting out the relevant chronology which is not in dispute between the parties, I should mention the Appellant's allegation of fraud. The Appellant's case is that a person unknown, who was in all probability working for the Respondent, altered the original assessment form so as to change the assessed degree of disability from 75% to 25%. Prior to the hearing, Mr Lock and Mr Skelt invited me to leave this issue to one side for the time being as it may become irrelevant, depending on my rulings on the construction and limitation issues in this Appeal. Counsel were also concerned that if the fraud allegation was to be explored, then the one day allocated for this Appeal would be insufficient. Accordingly, it was agreed that at this stage I should rule upon the construction and limitation issues only. Whilst the allegation of fraud is not accepted by the Respondent, the facts relevant to the construction and limitation issues are not in dispute.

4. The following facts are agreed. Angela McLoughlin joined West Yorkshire police in 1977. On 31 January 1982, in the course of her duties as a police constable, she was assaulted whilst attempting to arrest an individual believed to be guilty of burglary. She was beaten about the head and face. She was medically retired from the police force on 18 December 1983. An injury pension under the Regulations is calculated by reference to the person's degree of disablement, his average pensionable pay and the period in years of pensionable service (Schedule 3, paragraph 3: [AB 2/63]). In a written report dated 12 January 1984, Dr Anderson assessed the Appellant's degree of disablement as 25% [5/50], which placed her within "Band 1" of the scheme for the purposes of calculating her injury award. The injury award comprises a one-off gratuity payment expressed as a percentage of average pensionable pay, and an annual pension payment which carries a minimum income guarantee ("MIG") expressed as a percentage of average pensionable pay, with that percentage being linked to the

number of years' service (See the table in Schedule 3, paragraph 3: [AB 2/64]). The effect of Dr Anderson's assessment of 25% disability, was that the Appellant qualified for a gratuity of 12.5% and a MIG of 30%.

5. In May 2004 the Respondent notified the Appellant that her injury benefit would be reviewed pursuant to Regulation 37. That review took a considerable amount of time and resulted in a complaint by the Appellant to the Pensions Ombudsman. For present purposes it is sufficient to say that as a result of an appeal from the initial medical assessment, in May 2009 the Police Medical Appeal Board ("PMAB") assessed the Appellant's degree of disablement as 88%. That assessment placed the Appellant in Band 4, resulting in a MIG of 85%. Had that been the level of assessment at the date of her retirement, she would have been entitled to a gratuity of 50%, rather than the 12.5% she received. The Respondent accepted that the band 4 MIG should be backdated to November 2007 (being the date of the initial medical opinion received as part of the Regulation 37 review).

6. I do not consider it necessary to go into the detail of the complications of that review process. The outcome, in terms of the date from which Band 4 has been paid, is what is relevant for the purposes of this appeal, subject to one important point. On the face of it, the fact that the reviewed pension was backdated is at odds with the argument put forward by the Respondent in this Appeal. However, when I raised this in the hearing, I was advised that the backdating was likely to have been done on the basis of the understanding of the legal position at that time (being prior to the decision in *R (Fisher) v Chief Constable of Northumbria* [2017] EWHC 455 (Admin) which I shall consider later in this judgment). Counsel agreed the fact of that backdating in no way informs the decisions I have to make in this case.

7. In March 2015 the Pensions Ombudsman delivered her decision in respect of complaints made by the Appellant on various matters arising out of the handling of her pension. A summary of her complaints appears at page 1 of the Ombudsman's decision [Tab 4/29]. The complaint was upheld in relation to delay in reviewing her injury benefit award. As part of her complaint to the Ombudsman, she made allegations as to the motives behind what she received by way of pension and how the Respondent dealt with her case, but the Pensions Ombudsman did not think it necessary to make findings as to the allegations of fraud, ulterior motives and deceit in order to reach her decision [4/35, paragraph 33 and 4/37, paragraph 49].

8. The issue as to whether the original medical assessment document was altered from 75% to 25% continued to be raised on behalf of the Appellant as is clear from the email correspondence at [8/70 and 71], and the Appellant sought a reconsideration under Regulation 32. In August 2017 the Respondent accepted the request for reconsideration under regulation 32 [8/73]. As part of that reconsideration the Appellant was medically assessed by Dr Zahid Iqbal and by written report dated 6 April 2018 he stated as follows:

> "**Discussion**
>
> Reasonably contemporaneous reports from various specialists, including psychiatric and neurology would appear to indicate that her earnings capacity was significant (sic) reduced in the months and years following the injury. Various additional

> diagnoses have added to the complexity of this case, but a key report from Dr K Ford, Consultant Clinical Psychologist and Neuropsychologist, completed in (sic) 18 June 2008, does provide a medically plausible explanation for the problems that she has had since the injury. I think it is quite possible to project those findings back to the time of the original assessment by Dr Anderson who approved medical retirement on the basis of confusion and anxiety state. It would appear that the original decision by Dr Anderson was based wholly on the psychological consequences of the injury, which have later been attributed mainly to organic disease and to the frontal lobes. Given that the assessment at the time indicated a significantly reduced ability to work and given that most of the medical evidence would suggest that no other factors played a significant role apart from the injury in her condition, a level of disablement consistent with band 4 would appear to be reasonable and supported by the evidence.
>
> **Conclusion and Decision**
>
> In my opinion, based on the assessment carried out today as well as the evidence to hand, it is my opinion that at the time of the original decision in January 1984, a band 4 degree of disablement was appropriate" [6/54]

The Construction Issue

9. The Appellant's case is that Dr Iqbal's fresh report, being by way of a re-consideration under Regulation 32(2), replaces Dr Anderson's report of January 1984, and, as a consequence, the payment obligations owed by the Chief Constable are substituted for the payment obligations owing by the Chief Constable arising as a consequence of the previous report. In other words, the Appellant asserts that the Regulations mandate back payments to cover the period from December 1983 to 2007. The Respondent's case is that the payment obligation is affected only from the date of Dr Iqbal's report, that is from April 2018, and that the Appellant is not entitled to any backdated payments.

10. Mr Lock submitted that the Regulations are a self-contained statutory code which cover the following: (i) who is entitled to what; (ii) how much a person is entitled to receive; (iii) who the relevant decision-maker is; and (iv) the effect of those decisions. Regulation 11 [AB 2/13] contains the criteria to be satisfied before a former police officer is entitled to an injury award. There is no dispute in this case that the Appellant satisfies all three criteria in Regulation 11 and is thus entitled to both a gratuity and an injury pension, in both cases calculated in accordance with Schedule 3 of the Regulations. It is common ground that the Respondent is the Police Pension Authority for the purposes of Regulation 41 [AB 2/44] and thus has a statutory duty to make any payments which fall due under the Regulations.

11. There are no time limits for making an application under the Regulations, and no process which requires the making of an application. Mr Lock submitted that entitlement to a pension under the Regulations is a status issue and not an application

issue. He referred me to Regulation 43(1) which provides that the pension element of the award is payable "… in respect of each year as from the date of his retirement" [AB 2/45]. He submitted, therefore, that the pension is an amount that becomes payable from the date of retirement and throughout the remaining life of the former officer. He relies upon the wording making the pension payable "in respect of each year", which he submitted does not necessarily require payment in the year in question. In support of the submission he referred me to the decision of HHJ Moore in the case of *Lloyd Kelly v Chief Constable of South Yorkshire Police,* a transcript of which was provided in the appeal bundle [12/ 223 -232]. In that case the Applicant applied for the pension 10 years after he retired as a result of an injury in the execution of his duty. HHJ Moore accepted the pension should be backdated.

12. As I commented at the time of the submission, it seems to me inevitable that the process of medical assessment might take some time in any event, such that the outcome of that could easily fall into a subsequent pension year or years, and it would seem to me obvious that the wording would allow for, and was intended to allow for, the backdating of the pension in those circumstances.

13. By Regulation 30, decisions as to whether a former police officer is entitled to any, and if so what, awards under the regulations is determined by the Police Pension Authority. However, the Regulations require certain decisions to be referred to a duly qualified medical practitioner including, whether the person concerned is disabled, whether the disablement is likely to be permanent, whether the disablement is the result of an injury received in the execution of duty, and the degree of the persons disablement (Regulation 30(2) [AB 2/34-35]. In seeking medical opinion, the pension authority can refer a decision to a single doctor or to a board of duly qualified medical practitioners (Regulation 30(5): [AB 2/35]. By Regulation 30(6), the decision of the selected medical practitioner ("SMP") on the question or questions referred to him shall be expressed in the form of a report and shall, subject to Regulations 31 and 32, be final [AB 2/35]

14. Regulation 31 [AB 2/31] provides a route of challenge to the decision of the SMP by way of an appeal to a board of medical referees (the PMAB). This Regulation enables the former officer to appeal the decision, but not the Police Pension Authority. On an appeal, the decision of the PMAB shall, if it disagrees with any part of the report of the SMP, be expressed in the form of a report and it shall be final, subject to the provisions of Regulation 32. The right of appeal must be exercised within 28 days after the officer has received a copy of the report of the SMP or such longer period as the Police Pension Authority may allow.

15. Regulation 32 [AB 2/36-37] provides a route to challenge by way of further reference to medical authority. The relevant provision for the purposes of this Appeal is Regulation 32 (2) which, so far as relevant, provides as follows:

> "The [police pension authority] and the claimant may, by agreement, refer any final decision of a medical authority who has given such a decision to him, or as the case may be it, for reconsideration, and he, or as the case may be it, shall accordingly reconsider his, or as the case may be its, decision and, if necessary, issue a fresh report, which,……. shall be final"

The Regulations make provision for the instruction of an alternative medical authority if the original decision maker is unavailable or unwilling to act.

16. Regulation 37 [AB 2/40] contains provisions for the review, from time to time, of the degree of the pensioner's disablement, and for the revision of the injury pension if the degree of the pensioner's disablement has substantially altered. The revision may be an increase in payment, or a reduction in payment. A Regulation 37 review must take as its starting point the decision of the SMP as to the degree of disability (if this is a first review) or the previous Regulation 37 decision (on subsequent reviews), because the Regulations define each as a final decision (unless challenged under the only routes of challenge available in Regulations 31 and 32). The only duty on a Regulation 37 review is to decide whether there has been an alteration in the degree of disablement since the previous review or decision. It is no part of a Regulation 37 review to reassess the Claimant's degree of disablement at the date of retirement or the causes for it (See *R (Laws) v Police Medical Appeal Board* [2010] EWCA Civ 1099).

17. Mr Lock submitted that as Dr Iqbal's decision is substituted for the decision of Dr Anderson, it follows that it is substituted for all purposes including the assessment of pension entitlement such that the entitlement is backdated, and the Respondent must pay backdated pension for the period from December 1983 to November 2007. In his skeleton argument Mr Lock states that he understands it to be common ground that the fresh report replaces the previous report. I sought clarification from Mr Skelt as to whether he accepted that. Mr Skelt told me that he concedes that Dr Iqbal's report means that the Appellant would have qualified as Band 4 from December 1983. He told me that the principal issue was entitlement, as in "Is there an obligation to pay?" He also advised me he would rely on the points raised in his skeleton in support of a submission that it cannot be assumed that a different decision would in fact have been reached in 1984. In response to a question from me, he accepted that Dr Iqbal's opinion is final under the Regulations.

18. Before turning in detail to the respective parties' submissions, I wish to deal with one point that Mr Skelt made on behalf of the Respondent. Mr Skelt advised me that the decision in this case has very significant implications for other cases. Indeed, there were a number of interested persons in the public gallery. Mr Skelt did not suggest that the potential financial implications were relevant to the construction argument. That must be right. I have to construe the statutory Regulations before me and reach a decision based on those Regulations. I recognise that if I find in the Appellant's favour, this will result in a significant payment due from the Respondent to the Appellant in this case alone. However, the potential financial impact of any decision is not, in my judgment, a relevant consideration for me when construing the statutory Regulations. If the Regulations have a financial impact which was not intended or not foreseen by Parliament, then it is for Parliament to decide whether to change the Regulations.

19. Mr Lock submitted that the purpose of a reconsideration under the Regulations is to correct any error in the decision being reconsidered. He referred me to the decision of King J in *R(Haworth) v Northumbria Police Authority* [2012] EWHC 1225 Admin ("*Haworth*"). That case involved a challenge by way of judicial review to a decision of the Defendant Police Authority made in December 2010 refusing to agree under Regulation 32(2) to refer the Claimant's case back for a reconsideration of a 2006

decision. Before King J the Defendant conceded there might well be merit in the claim that the material decision was mistaken as a matter of law being contrary to the scheme of the Regulations as interpreted and construed in more recent case law (Paragraph 12 of Judgment of King J). However, the Defendant maintained that no matter how meritorious the underlying case which the Claimant wishes to raise on a reconsideration, it was far too late for her to seek to challenge the decision by way of a consensual reconsideration. In support of this the Police Authority relied on the need to maintain the finality and certainty of pension decisions under the scheme. The Defendant also relied upon its own need for fiscal stability and the ability properly to budget for anticipated calls on its resources and not have to accommodate the sudden need to find monies to pay arrears of pension going back several years. Evidence had been filed on behalf of the police authority that the effect of backdating the decision in that case could have an impact approaching some £5 million (See paragraphs 14, 15 and 18 of the Judgment of King J).

20. At paragraphs 96-97 of his judgment, King J considered the statutory purpose of Regulation 32(2). He accepted that it should be construed as a freestanding mechanism as part of the system of checks and balances in the Regulations to ensure that the pension award, either by way of an initial award or on a review to the former police officer, has been determined in accordance with the Regulations and that the retired officer is being paid the sum to which he is entitled under the Regulations. He found there was no reason not to construe Regulation 32 (2) as, in part, a mechanism to correct mistakes either as to fact or as to law which have or may have resulted in an officer being paid less than his full entitlement under the Regulations, which cannot otherwise be put right. He pointed to the fact the review process under Regulation 37 could not assist the Claimant in correcting any errors made in the initial award. Whilst recognising that in an appropriate case delay might be such that the police pensions authority could properly conclude that no fair reconsideration was possible, King J found that delay of itself did not give grounds for the refusal of a reconsideration.

21. In reliance upon that decision, Mr Lock submitted that the whole purpose of correcting mistakes would be undermined by the Respondent's approach in this appeal. He submitted that the Respondent's argument that there is no backdating of an award amounts to the Respondent saying "Yes, we have not paid you money which you were entitled to, but there is no present entitlement to that money". Mr Lock submitted that approach undermines the whole basis of the decision in *Haworth*.

22. Mr Lock further submitted that as a final decision under the Regulations is subject to challenge only by an appeal under Regulation 31 or by reconsideration under Regulation 32, the outcome of such challenges should have the same effect. Whilst there is no authority as to the effect on payment obligations of a reconsideration under Regulation 32, Mr Lock submits that there is binding Court of Appeal authority as to the effect on payment obligations of a successful appeal under Regulation 31. He relies on the Court of Appeal decision in *R (McGinley) v Schilling* [2005] EWCA Civ 567 ("*Schilling*"). In *Schilling* two police officers had each appealed the initial decision of an SMP as to the extent of their disablement. In the case of the second police officer, the SMP held that he was 45% disabled, but on appeal the medical referee held that the officer was then 55% disabled. The medical referee did not apparently challenge the 45% assessment as at the date it was made but concluded

that there had been further deterioration increasing the disablement to 55% by the date of his own decision (see Judgment of May LJ at paragraphs 6 and 7). The issue for the court was whether the appeal was directed to the extent of disablement as at the date of the decision of the SMP, or whether it was a fresh decision to be made by the medical referee at the date of his appeal decision. The court found that the appeal was a full reconsideration and that the decision was to be taken as at the time the referee was making his appeal decision.

23. In the case of the second police officer, the effect of that decision was to increase his pension entitlement. In argument in that case, Counsel on behalf of the Police Pension Authority pointed out that since the pension is payable from the date of retirement, a decision of the medical referee on appeal might result in an increased pension backdated to the date of retirement for a degree of disablement which did not exist at that date (May LJ; paragraph 32). May LJ dealt with these issues at paragraphs 46 to 48 in the following terms:

> "46. I acknowledge that there is some force in the submissions…… but they lose much of their force when it is appreciated that the Regulations expect an appeal to take place quite soon after the selected medical practitioner's decision. In addition, regulation L3 [*now Regulation 43*] provides for the pension to be paid from the date of retirement, and there is no necessary link in all cases between the decisions of the SMP or the medical referee and that date.
>
> 47. Acknowledging, as I do, that the submissions have some force, they nevertheless do not persuade me that what I consider to be the clear import of regulation H2(2) [*now Regulation 31*] should be seen as wrong.
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> 48. In any case, there may be an element of swings and roundabouts here. The police authority suggest that backdating may result in over compensation. But if the police authority's construction is correct, they could equally be under compensation if the officer's condition deteriorated to an extent greater than had been anticipated by the SMP"

24. Mr Lock submitted that *Schilling* is an important decision because the court found that the appeal decision of the medical referee was a de novo decision, and that decision takes effect in substitution for the decision appealed against. Even though the second police officer was appealing a perfectly proper decision, the new decision is in substitution and, under Regulation 43, that decision governs the entitlement to the higher level pension in respect of each year from his retirement. Mr Lock submitted that amending a final decision under either Regulation 31 or Regulation 32 will have the same consequences for the Chief Constable's payment obligations. The practical effect was that the officer, who had been paid Band 2 since the date of his retirement, acquired the right to be paid Band 3 from that date as a result of the later decision of the medical referee. Hence the court acknowledged that the appeal decision was backdated to the date of retirement. Mr Lock submitted the use of the same wording in Regulations 31 and 32 in relation to the requirement to issue a further report where the appeal or the reconsideration, as the case may be, disagrees

with the earlier decision, must mean that the impact of the further report is the same in each case.

25. Accordingly, Mr Lock submitted that where a fresh report is issued on a reconsideration under Regulation 32(2), it must follow that, pursuant to the overall scheme of the Regulations, any fresh report made under Regulation 32(2) which changes the degree of disablement of the former officer, takes effect in substitution for the report which it replaces. The Regulations provide in each case that the new decision in the new report becomes final, (unless itself successfully challenged under the Regulations). Mr Lock submitted, Dr Iqbal's report is final in respect of the decision he had to take, namely that the Appellant is entitled to a Band 4 pension from the date of her retirement. He submitted the earlier decision ceases to have effect because it has been overtaken. The new decision is substituted for the earlier decision.

26. He further submitted that at that point, applying the wording of Regulation 11, the former officer becomes "entitled" to a gratuity and pension as calculated in accordance with the fresh report, and the Chief Constable comes under an obligation to make those payments as a result of the statutory duty imposed by Regulation 41.

27. Mr Lock pointed out that when the Respondent agreed to a reconsideration, the Appellant was already being paid pension at a Band 4 rate. He submitted that it was wholly irrational for the Chief Constable to agree to reconsideration at that point, because on the Chief Constable's view of the law, that payment is not backdated, and there was no benefit at all for the Appellant in going through the reconsideration process. In response to this point, Mr Skelt suggested that there was a reason for the Chief Constable to agree a reconsideration in that the request from the Appellant's solicitors was based on the outstanding allegation of fraud. I do not find that particularly persuasive. Since the allegation of fraud would not, and could not be determined by a reconsideration, there was no point in a reconsideration unless it was going to have some impact on the pension entitlement. On the limited email correspondence available to me [8/68–75], it appears that the Respondent's legal department were refusing to agree a reconsideration on the basis that the Pension Ombudsman's decision had dealt with all outstanding matters, and the Appellant's solicitors were pointing out that it did not deal with the allegations of fraud. I have no evidence as to why The Chief Constable agreed to a reconsideration. In any event, I do not consider the fact that the Chief Constable agreed to a reconsideration under Regulation 32(2) assists me in connection with the construction decision I have to make.

28. Mr Skelt's primary submission is that the reconsideration results in a fresh report in substitution for the previous report, but which takes effect only from its own date and does not travel back in time. He submitted that payments from the date of the new report are referable to the fresh report rather than anything that went before. Whilst in this particular case that would make no difference factually, because the Band 4 pension has been in place since 2007, in another case there could be a significant difference altering the pension entitlement either up or down. He reminded me that a reconsideration does not mandate any particular outcome and that there could be no change to the original decision, or there could be an alteration either upwards or downwards.

29. Mr Skelt pointed out that Mr Lock's submissions proceed on the basis that the decision in 1984 was wrong in 1984, and not just wrong in retrospect. Mr Skelt told me that the Respondent does not accept this. Mr Skelt pointed out that as part of the Regulation 37 review initiated in this case in May 2004, the initial medical opinion resulted in the Appellant's degree of disablement being reduced from 25% to 15.42%. In fact, this was the opinion of two separate SMP's as the first doctor consulted did not complete the assessment and a second opinion had to be taken. The Appellant appealed that assessment and further medical opinions were sought. When the PMAB issued its report, it had the benefit of a very recent report from Dr K Ford, a Chartered Neuropsychologist. Dr Ford took a different view to the two SMP's. Ultimately the PMAB gave great weight to Dr Ford's conclusions and upheld the appeal [8/146-156]. Mr Skelt pointed to various matters arising out of that decision. In particular he pointed to a number of matters all representing pre-accident history: at [8/150] the history of mental illness before joining the police force,; at [8/151] other significant factors before the index event including the breakdown of her relationship with her husband and attempted suicide; a long history of depression and nervous instability before joining West Yorkshire police; and at [8/152] that the earliest record of depression dates from November 1970. He further referred me to the comments at [8/151] that the police authority stated there was no medical evidence to support the proposition that she suffered significant brain damage/injury at the index event; and that it was noted that an MRI scan carried out did not show any evidence of traumatic brain injury though it picked up a sphenoid meningioma.

30. In the light of those matters he submitted it was potentially unsurprising that in 1984 Dr Anderson only came to a 25% assessment of the impact of this injury on the Appellant's ability to work when compared with other factors. Mr Skelt submitted that we cannot say that the 1984 decision was necessarily wrong. He pointed to the fact that the reasons for the 1984 decision appear to have been lost. He submitted that the competing medical opinions before the PMAB, and the decision of the PMAB at [8/155] show that medically this was a complex case with only two out of the seven conditions diagnosed being considered to have a relationship with the index event. Mr Skelt submitted that the only reason Dr Ford was preferred was because his report was the most recent and because of the robustness of particular tests carried out by Dr Ford [8/155].

31. He then took me to Dr Iqbal's decision at [6/53-55], and in particular the paragraphs at [6/54] which I have quoted in full at Paragraph 8 above. Mr Skelt submitted those paragraphs make it clear that Dr Iqbal's decision is based not only on the situation in 1984 but on the passage of time and the benefit of updated information. He submitted that Dr Iqbal relied on much more recent and contemporary knowledge in relation to the Appellant's medical condition as it has developed and had transposed that back to explain the position in 1984. He pointed, in particular, to the passage referring to Dr Anderson's original decision being based wholly on the psychological consequences of the injury, which have later been attributed mainly to organic disease and to the frontal lobes. I recognise that, but the next sentence goes on to say that given that the assessment at the time indicated a significantly reduced ability to work, and given that most of the medical evidence would suggest that no other factors played a significant role apart from the injury in her condition, a level of disablement consistent with Band 4 would appear to be reasonable and supported by the evidence. That sentence appears to consider the position as at 1984, although I recognise that the "Conclusion

and Decision" paragraph refers to the assessment carried out today as well as the evidence to hand when reaching the opinion that at the time of the original decision in January 1984, a Band 4 degree of disablement was appropriate.

32. The difficulty I have with these submissions is that they are inviting me to go behind Dr Iqbal's decision, which the Regulations prescribe as a final decision (unless challenged under the Regulations, which Dr Iqbal's decision has not been). They invite me, in effect, to conclude that Dr Iqbal's decision amounts to a decision that he was only able to reach because of the degree of information available in 2018. Mr Skelt submitted that the decision does not amount to a decision that the 1984 decision was wrong at the time it was taken, but rather a decision that, in retrospect and with the benefit of the information available in 2018, it can now be said that the decision in 1984 was incorrect.

33. Mr Skelt submitted there were aspects of Dr Iqbal's decision that make no sense on their face. When I suggested that he was nevertheless stuck with that decision, he accepted that. The difficulty with the approach I'm invited to take by Mr Skelt is that he invites me to treat this as a final decision operative only from April 2018. I struggle with that approach in the context of the Regulations when considered as a whole. The effect of the Regulations is that the initial decision taken by the SMP is a final decision, unless challenged under Regulation 31 or reconsidered under Regulation 32. If either of those paths of challenges followed, and if the challenge produces a disagreement with the earlier decision, then a further report is issued and that becomes final (unless itself challenged under the Regulations). It follows, in my judgment that the initial decision taken by the SMP has ceased to be a final decision, precisely because the challenge has been successful. In my judgment, Mr Lock's submission is correct that the fresh decision is substituted for the decision which has been challenged and which can, by definition, no longer be the final decision. If Mr Skelt is right, the position is that the 1984 report ceased to be a final decision, but the 2018 report by way of reconsideration is final only from April 2018, at least in terms of its impact on payment obligations. The difficulty I have is that I cannot fit that analysis into the decision making process set out in this statutory scheme. There is no basis within the statutory scheme for Dr Iqbal to make a decision that the Appellant is entitled to a Band 4 pension based on her disablement as at April 2018. That is not something Dr Iqbal was asked to decide, nor indeed did he have any standing to do so as this was not a review pursuant to Regulation 37. It was a reconsideration. In answer to the question "A reconsideration of what?", in my judgment the answer must be a reconsideration of the 1984 decision as to the extent of her disablement.

34. In my judgment Dr Iqbal's decision is a final decision which is substituted for the 1984 decision. I consider it goes further than simply amounting to confirmation, with the benefit of hindsight, that the Appellant would have qualified as Band 4 from December 1983. In my judgment it concludes that she was entitled to be paid at the Band 4 rate from December 1983.

35. I now turn to consider Mr Skelt's submissions on the issue as to whether that decision requires that the Appellant must be paid at Band 4 rate from the date of her retirement in December 1983. He disputes Mr Lock's submission that the outcome of the two routes challenging finality (Regulation 31 appeals and Regulation 32 reconsideration) must necessarily have the same outcome or same consequence. He submits that the *Schilling* case must be put in its proper context. He submitted it is important to bear

in mind that case was considering challenges by way of appeal, and it was an important factor in that case that appeals were expected to be dealt with within a relatively short timeframe. He relies in particular on the judgment of May LJ at paragraph 46 (quoted at Paragraph 23 above), that the submissions in relation to backdating lose much of their force when it is appreciated that the Regulations expect an appeal to take place quite soon after the SMP's decision. Mr Skelt submitted that the swings and roundabouts referred to in Paragraph 48 of the judgment of May LJ are acceptable and in keeping with the overall scheme of the Regulations in the context of the time frames for an appeal. Mr Skelt pointed out that the two appeals under consideration in Schilling covered, for the first Appellant, the period July 2001 to August 2003, and for the second Appellant, the period April 2002 to November 2003, each relatively short periods in the overall scheme of these pension issues. Accordingly, Mr Skelt submitted that the *Schilling* decision does not help the Appellant. He further submitted that the decision in *Schilling* is not inconsistent with the Respondent's case in this Appeal as *Schilling* was considering a different position in relation to an appeal under the Regulations, rather than a reconsideration.

36. Mr Skelt submitted that I need to give consideration to the underlying purpose of the scheme which he submitted is to provide certainty to pensioners to whom it applies. This he submitted is supported by repeated comment in the authorities. He submitted that if the Appellant's interpretation is correct (i.e. any reconsideration must be backdated) it would mandate a Police Pension Authority, on performing a Regulation 32(2) reconsideration, to retrospectively and fundamentally alter the pension payable to the pensioner. This is because the reconsideration could not just include a reassessment of the amount of an award but whether any award was a payable at all.

37. Mr Skelt referred me to the case of *R (Evans) v Cheshire Constabulary [*2018] EWHC 952 (Admin) ("*Evans*"), a decision of Lane J. That was a case where the police officer was awarded disability pension on the grounds of permanent disablement as assessed by the SMP, but when he applied for an additional injury pension, the PMAB found no permanent disablement. In that case Lane J decided that the finality of a decision of an SMP taken for the purposes of the Regulations was binding, not just at the decision itself, but also as to the reasons underlying that decision. Lane J found that the findings in the first decision on the question of disablement and its permanence (under Regulation 30(2)(a) and (b)) were binding on the PMAB for the purposes of the injury pension. At paragraph 37 of his judgment Lane J said this:

> "There is, in fact, a sound policy reason for that decision. As Mr Lock submitted, police officers who are required to retire on the grounds of permanent disablement are entitled to a degree of finality in respect of their entitlement to pensions. A police officer who has to retire as a result of what is then considered to be permanent disablement caused in the line of duty should not be at the mercy of a subsequent medical assessment, that he or she was not, in fact, permanently disabled. That applies to an injury pension, as much as it does to a disablement pension. In the absence of statutory wording to the contrary, there is no reason to treat the injury pension as a more fragile form of benefit"

38. Mr Skelt submitted that Mr Lock's submissions in that case are the opposite of his submissions in this case, and that backdating undermines the very certainty that Mr Lock was arguing for in that case. I am not persuaded that is the case. The certainty which Mr Lock was arguing for in *Evans* was certainty as to the whether the officer is disabled and whether the disablement is permanent. That is not the same thing as certainty as to payment of injury benefit which requires further factors to be considered, namely whether the disablement is the result of an injury received in the execution of duty, and the degree of the person's disablement. Mr Lock accepted that if a reconsideration resulted in a reduced pension band or even a finding adverse to the officer on these issues and that decision is backdated, then the officer could be subject to a claim to recover significant sums by way of overpayment. Indeed, the scheme for payment of injury benefits provides for their review with express recognition that the review might result in termination of the injury pension (Regulation 37(3)), although I recognise that would not have retrospective effect.

39. However, there is some support for Mr Skelt's approach in the case of *R (Fisher) v Chief Constable of Northumbria* [2017] EWHC 455 (Admin) ("*Fisher*"). Fisher is a case dealing with a Regulation 37 review. The SMP appointed by the Chief Constable in that case concluded there had been a significant change in the Claimant's degree of disability and that the pension should be reduced from Band 4 to Band 3. The Claimant appealed to the PMAB which concluded that the injury pension should be reduced to Band 1. The Chief Constable purported to backdate the Band 1 pension to the date of the report by the SMP. Garnham J held that the changed pension should take effect from the date of the appeal (the PMAB decision) and not the date of the original report of the SMP. At paragraph 56 of his judgment he said this:

> "However, if it is right that appeals are to be conducted on the basis of current evidence, and if it is right that current evidence can result in a change to the level of pension, it seems to me necessarily implicit in the scheme of the Regulations that the date on which the changed pension is to take effect is the date of the appeal. It would be odd in the extreme if an appeal were to be decided on the basis of evidence of recent change in disability, yet the altered pension were to run from some earlier date. In my judgment it must be inherent in the scheme that the altered pension should take effect on the date when it is recognised that altered circumstances justify a change in pension"

40. Unsurprisingly, Garnham J had been referred to the case of *Schilling.* He considered the focus of the decision in *Schilling* was on whether the effect of the injury should be addressed on appeal by the medical referee taking account of evidence as at the date of his decision. In Garnham J's judgment *Schilling* said nothing directly about the date on which a change to the pension should take effect. He referred specifically to the comment of May LJ at paragraph 46 of *Schilling* (set out in Paragraph 23 above) that there is no necessary link between the decisions of the SMP or the medical referee and the retirement date.

41. In reliance on *Fisher*, Mr Skelt submitted that the circumstance justifying a change in the pension is Dr Iqbal's contemporaneous 2018 assessment of the Appellant's degree of disability. Accordingly, he submitted that the changed pension is payable only

from the date of Dr Iqbal's report, and is not backdated to December 1983. He further submitted that *Schilling* substantially predates all the recent authority on the relevant Regulations. He submitted that in the light of more recent authorities, the correct position is that the date for any change in payment is the date on which the relevant decision is made. He submitted this applies in all cases.

42. However, he further submitted that if he is wrong about that, the extent to which *Schilling* remains good law is limited to appeals. He submitted *Schilling* should be seen in the context that it is a decision on the appeals process where the tight timescales are such that there is no infringement of the requirement of certainty because of the time limits imposed on the right to appeal, with the result that any appeal will be backdated only over a narrow period of time. He reminded me that the Court of Appeal made the very point in *Schilling* that the timescales are such that appeals would be expected to happen promptly.

43. Mr Skelt further submitted that if on a reconsideration subsequent medical opinion suggested that the permanent disability was not in fact due to injury on duty but to something else unrelated, the effect of Mr Lock's submissions would be that the officer would have to repay everything which had been paid. This, Mr Skelt submitted, runs entirely contrary to the fundamental requirement of certainty in all the authorities. He submitted that if the statutory provision was intended to have that severe effect, it would be expected that it would say so.

44. Mr Skelt submitted that it is central to the statutory protection across this self-contained regulatory scheme that there is certainty to protect the individual pension. For this reason, medical decisions are final subject only to challenge under Regulations 31 or 32. He submitted, however, that the limitations on finality as a result of the processes under either Regulation 31 or 32 cannot be retrospective as this would drive a coach and horses through the certainty which the scheme affords to the individual officers.

45. I pointed out to Mr Skelt that Garnham J was dealing specifically with Regulation 37 review which inevitably is based on contemporaneous evidence and altered circumstances at that time, as compared with a previous review or the original decision if this is a first review. Mr Skelt accepted that but submitted that Garnham J's decision must nevertheless be seen in the light of *Evans* and the authorities as to the needs for certainty in the scheme. He submitted that a contemporaneous change in understanding of the pensioner's case should come into effect on that date and not be retrospectively enforced.

46. Mr Skelt also pointed out that the effect of Mr Lock's argument is that the mandated backdating goes all the way back to 1983 and ignores everything that has happened in between. On the facts of this case, what has happened in between is a Regulation 37 review which brought the pension up to Band 4. However, there could be a case where a reconsideration results say in a reduction from an original finding of Band 4 to a new finding of Band one. Any reviews in the meantime under Regulation 37 have been bound to accept as the starting point the previous decision and, therefore, to start from Band 4. However, those review decisions are final and whilst the original decision has been reconsidered in this hypothetical scenario, none of the intervening Regulation 37 reviews has been reconsidered. Are they all simply overridden by a backdated reconsideration of the original decision? In my judgment they cannot be

since each is a final decision. Of course, any Regulation 37 reviews could be reconsidered, but only by agreement between the Police Pension Authority and the retired officer under Regulation 32(2). In this hypothetical scenario there would be no reason at all why a retired officer would wish to agree to the Regulation 37 reviews being opened for reconsideration. It plainly would not be in his or her interest.

47. Mr Lock submitted that the decision in *Fisher* on the operative time for payment was in fact obiter because the primary decision was to quash the decision of the PMAB, and therefore the decision as to date from which it took effect was not necessary. Nevertheless, Mr Lock submitted that, properly understood, there is no tension between *Schilling* and *Fisher*. This he submitted is because *Fisher* is a decision on a review under Regulation 37, and a review is prospective in effect only, and takes effect from the date of the relevant decision being either the SMP, or if successfully appealed the PMAB decision. Being a review, the earlier and original decision that Mr Fisher was entitled to a Band 4 pension remained operative until it was altered by a final decision in the review process. That final decision was the decision of the PMAB.

48. Mr Lock submitted the position is completely different where there is a reconsideration which is in substitution for the earlier decision, and must, he submitted, therefore take effect from the date of the earlier decision for which it is a substitution. Thus, the timing of the decisions is different. He submitted that a reconsideration replaces the earlier decision and must be final as of the date of the earlier decision. A review decision is final as of the date is made and only then replaces an earlier decision.

49. Whilst I am troubled by the impact on the hypothetical situation which I have set out in Paragraph 46 above, I have come to the conclusion that the only sensible way to construe these Regulations is that a reconsideration must be in substitution for and in replacement of the previous final decision which by definition falls away. The purpose of the reconsideration is to correct errors and, as identified by King J in *Haworth* (see Para 20 above) to 2…ensure that the officer is being paid the sum to which he is entitled under the Regulations". As King J pointed out, an error cannot otherwise be put right under the Regulations. It seems unlikely that the draughtsman contemplated that errors might be corrected as many as 34 years after the original decision was made. Nevertheless, that is what has happened here. It is unnecessary for me to decide in this case what would happen in the hypothetical considered situation I have put forward in Paragraph 46, but it may be that the backdating would only take effect for a period up to the date of some other effective and different final decision. On the facts of this case the further final decision in the form of the review from 2009 happens to be the same.

50. I fully recognise the points that Mr Skelt made as to the difference between a decision based on contemporaneous information which informs a change of view of an earlier decision, and a decision to the effect that the original decision was in fact wrong based on the information available at that time. However, it seems to me that issues of that sort more properly go to informing the decision as to whether a reconsideration is appropriate at all. If the purpose is to correct mistakes, then a change in medical knowledge and the development of a condition such that the history can be reviewed in a different way, does not mean there was a mistake in the first instance. In this particular case, the Chief Constable agreed to a reconsideration. Indeed, on the face

of the original decision [5/50] there were grounds for considering that there must have been a mistake. The decision contains both the statement that the Appellant is incapable by reason of the disablement of earning any money, and the statement that the degree to which her earning capacity has been affected is 25%. It is clear from the marginal notes that one or other of those paragraphs should have been deleted, but it is equally clear that both have been completed in that the figure of 25% has been inserted in the box and the letter "s" has been inserted at the beginning of the second item to indicate that "she" is incapable etcetera. In this case, therefore, there was good reason for considering that there might have been a mistake and for agreeing to a reconsideration, albeit as long as 34 years after the event. This does not mean that every original decision will be amenable to reconsideration because of the advances in medical science and/or advances in the understanding of the retired officer's condition.

51. Having very properly agreed to a reconsideration in this case, in my judgment the effect is to substitute the medical opinion of Dr Iqbal for that of Dr Anderson with effect from the date of Dr Anderson's report, which carries with it the financial effects which flow from treating Dr Iqbal's report as if it had been the relevant report at that date. I accept Mr Lock's arguments that the effect of the reconsideration is to backdate not just the finding as to the level of pension but also the payment obligations that go along with that. Once it is accepted that Dr Iqbal's decision is substituted for Dr Anderson's decision and that Dr Anderson's decision therefore ceases to be final, the only final decision by which the pension can properly be calculated in this case with effect from the retirement date is that of Dr Iqbal. The natural reading then of Regulation 11 is that the Appellant is entitled to a gratuity and an injury pension in both cases calculated in accordance with Schedule 3 of the Regulations, based on the substituted decision of Dr Iqbal and from the retirement date. In reaching this decision I accept Mr Lock's submissions that there is no decision by Dr Iqbal that as at April 2018 the Appellant is entitled to Band 4 based on her disablement at that date. It was not something Dr Iqbal has been asked to decide and he has no standing to do so. I recognise the points Mr Skelt made as to Dr Iqbal's decision and certain confusing aspects of it, but it seems to me that having agreed to the reconsideration, the consequences simply flow from that. The Regulations provide that Dr Iqbal's decision is final and the Chief Constable has to abide by that. The purpose of a Regulation 32(2) reconsideration identified by King J in *Haworth* to correct mistakes and ensure the retired officer receives proper payment to which he is entitled would be wholly undermined if I were to accept Mr Skelt's submissions. I do not consider that I am assisted by the decision in *Fisher* since that is decision on a Regulation 37 review which can only take effect from the date the decision is made because the prior decision is a valid final decision up to the date of the new final decision under Regulation 37, the new final decision being that of the PMAB in the event that there is an appeal from the SMP.

Limitation

52. Mr Skelt submitted that the Appellant's claim for backdated pension is statute barred. He relies on Section 9 Limitation Act 1980 which provides that an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued. Mr Skelt pointed out that in her submissions to the Pensions Ombudsman the Appellant

claimed that the injury benefit should be backdated to 1982 (See Ombudsman's decision [4/36, paragraph 42]). He submitted the Appellant had sufficient knowledge in 2009 to give rise to a cause of action.

53. The difficulty with this submission is that on the facts of this case, knowledge does not form part of the cause of action. In 2009, or indeed at any time up to April 2018, if the Appellant had issued proceedings seeking payment of a pension at Band 4 rate for the period with which this appeal is concerned, that action would plainly have been struck out. At that stage, she had plainly been paid what she was entitled to based on the final decisions which were operative at that time. Whilst I have found that the effect of reconsideration is to backdate the entitlement to the pension to the date of retirement, in terms of a cause of action that entitlement arose only on the making of Dr Iqbal's report in April 2018 which substituted for the earlier report.

54. I accept Mr Lock's submissions that the Appellant's cause of action did not arise until Dr Iqbal produced his report because, until that date, the chief constable was under no statutory duty to make any Band 4 payment to the Appellant for the period December 1983 until November 2007. Mr Lock referred me to *Letang v Cooper* [1965] 1QB 232 at 242 where Diplock LJ described a cause of action as "…. simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". Until the substitution of Dr Iqbal's report, there was no factual situation which entitled the Appellant to obtain a remedy from the court for any backdated pension entitlement. Accordingly, in my judgment, the Appellant's claim is not statute barred.