



Neutral Citation Number: [2021] EWHC 1292 (Admin)

Case No: CO/4881/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN LEEDS

The Combined Court Centre
1 Oxford Row,
Leeds LS1 3BY

Date: 18/05/2021

Before :

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

Between :

THE QUEEN
On the application of
GRAEME FERGUSON

Claimant

- and -

POLICE MEDICAL APPEAL BOARD

Defendant

-and-

CHIEF CONSTABLE OF
NORTHUMBRIA POLICE

Interested
Party

Mr Aaron Rathmell (instructed by Taylor Law) for the Claimant
Neither the Defendant nor the Interested Party appeared or were represented
Hearing dates: 12 May 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailli. The time and date for hand-down is deemed to be 10am on 18 May 2021

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HHJ Davis-White QC :

Introduction

1. This is a renewed application for permission to proceed with judicial review brought by Graham Ferguson against the Police Medical Appeal Board (the “PMAB”). The decision in question is the dismissal of an appeal from a decision of a selected medical practitioner regarding the degree of impairment of the claimant. The degree of impairment is one of the factors used in determining the quantum of the claimant’s entitlement to an injury pension as a former member of the Northumbria police force who sustained an injury while acting in the course of his duty. The decision of the PMAB is contained in a report of the PMAB dated 6 August 2008 (the “Report”).
2. The Chief Constable of Northumbria police is joined as an interested party. He has filed an acknowledgement of service with summary grounds of resistance. The PMAB has not responded to the claim.
3. Permission was initially refused on the papers by order of His Honour Judge Saffman, sitting as a Judge of the High Court, dated 7 April 2021. Before me, Mr Aaron Rathmell appeared for the claimant. Neither defendant nor interested party appeared or were represented. I am grateful to Mr Rathmell for his written and oral submissions. I have also had the benefit of an acknowledgment of service from the interested party.
4. The claimant, a former officer with the Northumbria police, sustained injuries on 15 March 1989 while on duty as the driver of a police van. On that day, the claimant was in pursuit of the rider of a stolen motorcycle. The police van, driven by the claimant, crashed into another vehicle. The claimant was thereby injured.
5. The question of entitlement to a police injury pension was at that time governed by the then Police Pensions Regulations 1987 (the “1987 Regulations”). A Selected Medical Practitioner (an “SMP”) determined that the claimant was permanently disabled from performing the ordinary duties of a constable by reason of “*cervical and lumbar degeneration, a disablement received in the execution of his duty.*” Accordingly, he became entitled to a police “Injury Award” and an “Injury Pension” under the 1987 Regulations.
6. The relevant Regulations now governing the claimant’s right to an Injury Pension are the Police (Injury Benefit) Regulations 2006 (the “2006 Regulations”). Unless otherwise stated, a reference in this judgment to a “regulation” (or “reg”) is a reference to the relevant numbered regulation of the 2006 Regulations. The 2006 Regulations revoke and re-enact provisions relating to relevant police injuries formerly contained in the 1987 Regulations and the Police (Injury Benefit) Regulations 1987.
7. A very convenient and helpful summary of the main provisions of the 2006 Regulations is set out in the judgment of Linden J in *R (on the application of Goodland) v Chief Constable of Staffordshire Police* [2020] EWHC 2477 (Admin) esp. paragraphs [12]-[46] (the “*Goodland case*”).
8. The interested party in this case, the Chief Constable, is the police pension authority (the “PPA”) for Northumbria Police. The PPA of the force in which the relevant member was serving when he received his injury is the entity responsible for the

payment of the claimant's injury pension (reg 41). It also has other duties under the 2006 Regulations, including making certain determinations regarding awards and pensions.

9. Under the predecessor to what is now reg 11, the claimant became entitled to an injury pension as a person who ceased to be a member of a police force and who was permanently disabled as a result of an injury received without his own default in the execution of his duty. That pension is for life (regulation 43) (subject to the 2006 Regulations, which provide in various circumstances for variation as to quantum, forfeiture and withdrawal, among other things).
10. The quantum of the injury pension is calculated by reference to the person's degree of disablement, his average pensionable pay and the period in years of his pensionable service under a formula provided for by what is now Schedule 3 para 3 of the 2006 Regulations. A key element in the equation is therefore the degree of the person's disablement. The degree of disablement is determined by reference to the degree to which his earning capacity has been affected as a result of an injury received without his own default in the execution of his duty as a member of the police force (see now regulation 7).
11. Schedule 3 of the 2006 Regulations provides for four bands of degrees of disablement: 25% or less, above 25% up to 50%, above 50% up to 75% and more than 75%.
12. When initially assessed, the claimant's degree of disablement was assessed at 76%. This placed him in the band for "very severe disablement in respect of the degree of his loss of earning capacity", this is usually referred to as "Band 4".
13. The 2006 Regulations (and their predecessors) provided for reviews of the degree of disablement to be undertaken so that, if appropriate, the level of pension is adjusted to reflect developments. Under what is now reg 37 (1) it is provided as follows:

"37.— Reassessment of injury pension

(1) Subject to the provisions of this Part, where an injury pension is payable under these Regulations, the police pension authority shall, at such intervals as may be suitable, consider whether the degree of the pensioner's disablement has altered; and if after such consideration the police pension authority find that the degree of the pensioner's disablement has substantially altered, the pension shall be revised accordingly."

14. Although the PPA is the primary decision maker regarding police injury pensions, certain medical questions have to be referred by the PPA for determination by a duly qualified medical practitioner selected by the PPA (a "SMP"). (There is also an ability to refer to a board instead of to a sole SMP). The decision of the SMP will be final, subject to a right of appeal by the member (or former member) of the police force claiming entitlement to the pension (see regs 30 & 31).
15. As pointed out in the *Goodland* case:

"[23] The SMP is appointed by, but otherwise independent of, the PPA. Obviously, they are subject to the statutory duties specified by the 2006 Regulations as well as the other professional and legal obligations which apply to them".

16. The appeal is to a board of medical referees (“BMR”), appointed in accordance with arrangements approved by the Secretary of State (see reg 31). Sub-paragraph (3) of reg 31 provides:

“(3) The decision of the board of medical referees shall, if it disagrees with any part of the report of the selected medical practitioner, be expressed in the form of a report of its decision on any of the questions referred to the selected medical practitioner on which it disagrees with the latter's decision, and the decision of the board of medical referees shall, subject to the provisions of regulation 32, be final.”

Regulation 32 deals with limited circumstances in which a matter may be referred back to an SMP or to a BMR.

17. In the *Goodland* case, the Judge referred to the process to be undertaken under a referral under regulation 37 as follows:

“[42] ...it is for the SMP to compare the earlier degree of disablement with the present degree of disablement with a view to deciding whether it has altered substantially. This will entail identifying any relevant change in circumstances since the previous assessment, including any change in the effects of the duty injury or any other change which affects the pensioner's earning capacity. On the logic of Laws, if there have been no changes then the previous assessment stands. But if there have been, and there is a substantial alteration in the degree of disability, then the pension will be adjusted by reference to the Table in Schedule 3 to the 2006 Regulations.

[43] I respectfully agree with Burton J in Turner that on this approach, issues of causation may be less central as it is a given that the pensioner is permanently disabled as a result of an injury received in the execution of duty. But it is possible to envisage cases where earning capacity has gone down since the previous assessment but this is as a result of a condition or circumstance which has arisen since the previous assessment, rather than as a result of the service injury. In such a case, the strict position would be that no adjustment should be made given the rationale for the relevant provisions as explained by Ouseley J in the South Wales Police case. In principle, in another case the effect of the service injury on earning capacity might diminish whilst the overall level of earning capacity stayed the same, or diminished, owing to subsequent unrelated health issues, in which case there ought to be a reduction in the award and so on. Similarly, the effect of the service injury might increase and yet the earning capacity remain the same or improve by reason technological changes, changes in the labour market or other changes in the circumstances of the pensioner.

[44] I therefore agree with Mr Holl-Allen that complex issues of causation may arise in the course of a reassessment under Regulation 37. I also agree with him that, quite apart from this, the fact that the SMP is required to consider whether there have been material changes in the position since the previous assessment tends to support the argument that the SMP will therefore require reliable information about the pensioner, including historic information about their health, what work they were capable of doing and what they were capable of earning. The need is likely to be the greater where, as here, it is a long time since the previous assessment and/or the review is being conducted by a different medical practitioner.”

18. In this case, there were reviews of the claimant's position in 1996 and 1998, but no changes made.
19. In 2010 the claimant was diagnosed with Alzheimer's disease.

The decision of the SMP

20. Following this diagnosis, the question of the degree of his disablement was referred to a SMP pursuant to reg 37. The SMP (Dr Phillips) determined on 25 September 2017 that the claimant's degree of disablement had substantially altered. She determined that Mr Ferguson's degree of disablement had altered such that he should now be placed in Band 1 (25% or less, slight disablement) rather than Band 4 (very severe disablement).
21. The claimant, with the agreement of the PPA as required by reg 32, then referred the matter back to the SMP. She had further material presented to her at this stage. She did not consider it necessary to carry out a face to face examination. On 8 February 2019 she confirmed her earlier determination.
22. To understand the medical determination that was made it is sufficient to set out the summary in the report of the PMAB:

“Following a paper review by the SMP (report dated 17 August 2017), the SMP reduced his award to Band 1. The SMP's rationale for the reduction was that the applicant had developed a non-qualifying medical condition (Alzheimer's disease) that reduced his earning capacity to nil and therefore subsumed the disablement arising from the injury on duty. The SMP noted that the information reviewed included the GP records and occupational health file. She drew functional information from the GP records to support her assessment including a report of his struggling to plan and complete activities, forgetting to eat and an ACEIII score of 66/100. It was also noted that though he was living on his own he was struggling with some aspects of daily living.”

23. The report continues, dealing with the referral back as follows:

“the applicant, Mr Ferguson disputed this SMP assessment and requested a reconsideration based on additional information (two psychiatrist reports) and a conditional (subject to the SMP agreeing to a face-to-face medical examination) consent to seek more information from GP.

....

The SMP considered the additional information provided [the two psychiatrists' reports and possibly, though it is unclear, further evidence from the GP] to buttress her earlier opinion and did not feel a face-to-face assessment was not [sic] required”

The Appeal to the PMAB

24. The claimant exercised his right of appeal to a BMR provided for by regulation 31 of the 2006 regulations. The BMR in this case was the defendant, PMAB.

25. The grounds of appeal are helpfully set out in the document described as “Appellant’s Core Submission” dated 20 October 2019. The three “*bald appeal points*” are identified as follows:

“Firstly the decision is based on a series of assumptions, the SMP also failed to approach her statutory task correctly and inevitably reached an incorrect conclusion on the evidence before her.

The SMP assumed that dementia was a non-qualifying injury and further from its mere presence, that its effects had overtaken the effects of the qualifying injuries sustained as a result of the index event in 1989.

Secondly, the Appellant avers that the so-called non-qualifying injury, also described as the early onset of Alzheimer's or organic brain disorder, is in fact part of the duty related condition because it was caused by the index event and thus there has been no change in the 'degree of disablement'.

Thirdly, and in any event the condition is mild and its effects do not constitute a 'substantial alteration' in the degree of disablement, let alone have in fact overtaken the qualifying injury, being the very serious injuries sustained as a result of the index event.

Consequently there has been no substantial alteration in the Appellant's 'degree of disablement', thus his appeal should be allowed and his injury pension should be restored to its previous banding.”

26. It is, and always has been, common ground between the interested party and the claimant that the process under regulation 31 is an appeal by way of rehearing rather than review. It is (and always has been) common ground that on such a review, the BMR should act on the basis of the up to date evidence before it (see e.g. *R(On the application of Michaelides) v Chief Constable of Merseyside Police and Police Medical Appeal Board* [2019] EWHC 1434 (admin)). There is (and was) a dispute as to the precise extent to which the process may be said to be inquisitorial rather than adversarial.

The decision of the PMAB

27. The PMAB is assisted in its function by what might conveniently be referred to as a company providing secretariat assistance. At the relevant time that company was Health Management Limited (“HML”). Subsequently, another company has replaced HML.
28. The provisions of Regulation 31 are supplemented by Schedule 6 to the 2006 Regulations which is headed “Medical Appeals”. References to paragraphs (or paras) hereafter are to paragraphs of Schedule 3, unless the context otherwise makes clear.
29. Under para. 3, the BMR must consist of not less than three medical practitioners and at least one of them must be a specialist in a medical condition relevant to the appeal.
30. Under para.3 the BMR must appoint a time and place for a hearing. At that hearing it may interview or examine the appellant and must give prior notice of such hearing or for any further hearings.

31. The provision regarding medical examination and interview is supplemented by regulation 33 which provides as follows:

“33. Refusal to be medically examined

If a question is referred to a medical authority under regulation 30, 31 or 32 and the person concerned wilfully or negligently fails to submit himself to such medical examination or to attend such interviews as the medical authority may consider necessary in order to enable him to make his decision, then—

- (a) if the question arises otherwise than on an appeal to a board of medical referees, the police pension authority may make their determination on such evidence and medical advice as they in their discretion think necessary;*
(b) if the question arises on an appeal to a board of medical referees, the appeal shall be deemed to be withdrawn.”

32. The judgment in the *Goodland* case also dealt with another case relating to Mr Wright and others. The Judge considered at great length the interpretation of regulation 33 and, in particular, whether it encompassed not just a literal failure to attend for examination and/or for interview but whether it also caught a deliberate failure to make available medical records regarded as necessary by the SMP or the BMR to enable them to reach their decision. He decided that it did and, further, that this did not involve a breach of article 8 of the European Convention on Human Rights. He thus rejected the case that refusal to permit (in that case the SMP) to access a claimant’s medical records does not amount to a failure to submit to a medical examination or to attend for interview. For reasons that will become clear this decision, but also its underlying rationale, is relevant to the case before me. I therefore set out certain paragraphs of the relevant reasoning:

“ [189]It seems to me that the starting point is that Parliament should be assumed to have had in mind that, other than in an emergency, it would be highly unusual for a medical practitioner to conduct a medical assessment without any access to information about the patient’s medical history. This is true of a patient’s own treating doctor, but the position is a fortiori in the situation where the patient is claiming a benefit or payment, whether in the context of employment, social security, litigation or otherwise and the assessment is to be carried out by a doctor who has not dealt with them before. The very fact that the claimant’s entitlement and/or the extent of their entitlement needs to be established, whether or not it is formally disputed, means that the assessor is entitled to see all of the materials which are relevant to the assessment. They may also require access to these materials in order to obtain information which the patient is unable to recall, or to verify information which they say or believe they can recall. Where they are assessing loss of earning capacity arising out of a particular event, and particularly where they are assessing whether there has been a change in the loss of earning capacity consequent upon that event, the need for a consideration of the medical history seems obvious, and all the more so where they are assessing whether there has been any such change since an assessment carried out 20 years earlier by a different practitioner.

[190] Secondly, and following on from this point, the context in the present case is that the medical authority is being required to carry out an assessment for the purposes of establishing the applicant or award holder's entitlement to payments under a statutory scheme. As I have noted, Regulation 33 is not just concerned with situations in which the PPA is carrying out a review under Regulation 37. It applies to applicants for awards as well as award holders. It applies to all medical questions which arise under the 2006 Regulations including eligibility for the various types of award described in Part 2, reviews of existing awards pursuant to Regulation 37 and reductions in injury awards pursuant to Regulation 38 on the grounds that the former officer has substantially contributed to his disablement by his own default. It also applies to appeals to the Board pursuant to Regulation 31, and to Regulation 32 referrals to the SMP or the Board in the context of appeals to the Crown Court pursuant to Regulation 34, or to the appeal tribunal pursuant to Regulation 35. These provisions contemplate that the decision maker in relation to all medical questions which arise under the 2006 Regulation is to be the medical authority. It would therefore be surprising if, at the same time, they did not contemplate that the medical authority, even where they consider it necessary to carry out their statutory function, has the power to ask to see the applicant or award holder's medical records and that the medical authority is obliged to make a decision on the basis of such information as the applicant or award holder chooses to provide or is able to recollect, as Mr Lock submits. Plainly, the 2006 Regulations contemplate, as a cornerstone of the scheme, that the medical authority will be enabled to make decisions which can be taken by the PPA, the Crown Court and the appeal tribunal to be reliable and based on "accurate" and "adequate" evidence (Regulation 32(1), cited at paragraph 27 above) whereas Mr Lock's reading of the 2006 Regulations would seem to be inimical to this purpose.

[191] Third, in my view the language of Regulation 33 is deliberately broad so as to enable the medical authority to make an accurate assessment of the various different medical questions which may be referred. The key requirement is that the medical authority is provided with such information as he "may consider necessary in order to enable him to make his decision". The logic of Mr Lock's argument is that even if this is the view of the medical authority, and even if this view is entirely correct, say because the applicant or award holder can remember barely anything, Regulation 33 is not engaged. But in this context, it cannot be sensible to limit what the medical authority may consider to be necessary to fulfil his statutory task in the way proposed by Mr Lock. Mr Lock accepted, when it was put to him by me, that the applicant or award holder could be expected to answer questions rather than merely physically to "attend" an interview, and that these questions could be about his medical history. I also put it to him that this would be particularly important where the issue was one of mental as opposed to physical health, but it would be true of both, and he appeared to agree. But his position was that the 2006 Regulations did not then require the applicant or award holder to permit the medical authority to fill in gaps in memory, or to verify what they had said, by reference to medical records.

[192] In my view this is an artificial place in which to draw the line. Once it is accepted that the expectation reflected in Regulation 33 goes beyond merely being physically present at an interview or submitting to a physical examination,

and that it extends to an expectation to provide at least some of the information necessary to enable a reliable decision to be made, there is no reason why the Regulation should not extend to other matters which may be considered implicit in any medical examination or interview, namely that the practitioner will have access to the medical history where and to the extent that they deem this to be necessary. The phrase “such medical examination or ...such interviews as the medical authority may consider necessary” is sufficiently flexible to embrace interviews or examinations which are conducted on the basis that the interviewer or examiner has been authorised to familiarise himself with the relevant background. Refusal to agree to this is clearly capable of being a refusal to submit to, or attend, the examination or interview which the medical practitioner considers necessary to carry out their task i.e. one which is conducted on an informed basis and with access to such relevant information as is available.

[193] Mr Holt-Allen put the matter more broadly in contending for a general duty to cooperate. I prefer to rely on interpretation of the words of the 2006 Regulations. They do not create a duty on the applicant or award holder to do anything: rather, they give them a choice to comply with the requirements of the medical authority or allow the decision to be taken by the PPA, or their appeal to be deemed to be withdrawn. Regulation 33 describes particular forms of non-cooperation which have consequences rather than giving rise to a general duty to cooperate. Failure to cooperate with the medical authority’s requirements in relation to a medical examination or interview may lead to the conclusion that they have not attended or submitted etc and that they were acting wilfully or negligently, but the question remains the question posed by the terms of the Regulation.

[194] Fourth, Mr Lock attempts to make his position more attractive by arguing that in the event of a refusal of consent, the SMP should get on and make the decision, drawing adverse inferences where appropriate. However, if consideration of the medical records cannot be regarded as part of a medical examination or an interview, it is not clear from where the medical authority derives its power to ask to see them or on what legal basis an adverse inference could be drawn from a refusal of an unlawful request or a request with which there is no duty to comply. Conversely, if there is a power to ask, it is not clear why this could not be regarded as part of a medical examination or interview. Even assuming that there is such a power, the suggestion that adverse inferences could be drawn from a refusal to consent is also problematic: should general requests for access be made by SMPs and adverse inferences routinely drawn in the event of refusal and, if not, when and how will the SMP know whether a particular aspect of what they are being told is inaccurate or ought to be checked? It would be far better for the law to facilitate and encourage an informed and accurate decision by the medical authority, rather than one which makes assumptions about why consent is being withheld, and I consider that this is what Parliament intended. Moreover, the fact that, under Regulation 33(b) the result in the event that there is a failure to submit/attend etc is that the appeal is deemed to be withdrawn rather than that the medical authority, here the Board, must nevertheless make its decision, would seem inconsistent with Mr Lock’s analysis.”

33. According to the PMAB, matters were bedevilled because of an unresolved argument between the parties as to access to medical records. In particular, access to GP records and access to Occupational Health Records were in issue. However, the issue was significantly different to that considered in the Goodland case. In that case the question was whether a blanket refusal to provide medical records to the medical decision maker attracted the sanction of regulation 33. In this case the refusal has been one to make the medical records available to the PPA (but to make them available to the SMP).
34. The claimant was prepared to grant access to his GP records only to medical professionals but not otherwise to the PPA or its lawyers, and not even if such access was limited to use for the purposes of the appeal. This meant that the claimant was prepared for the PMAB members to see his medical records. He was also prepared to permit the SMP to have access to his records.
35. The potential role of the SMP in the appeal is as follows. Under paras 4 and 5 of Schedule 6, the PPA may be represented at the hearing. In addition, the PPA may appoint its own duly qualified medical practitioner to attend the hearing. The SMP may also attend the hearing. However, so far as any part of the hearing involves an examination then only medical practitioners may be present for that part of the hearing. As regards the PPA, as I read para 5, any medical practitioner it has appointed to attend the hearing may attend the examination (with the SMP). If the SMP does not attend the examination, then the PPA may appoint a qualified medical practitioner for the purposes of attending the examination. The contrary argument is that the PPA's separately appointed medical practitioner may only attend the examination if the SMP does not attend. When in attendance, the SMP and any separately appointed medical practitioner may only act as observer.
36. Although I have not heard argument on the point, my initial view is that the SMP retains his independent role and can attend the hearing on the basis that it is his decision which is under appeal. There is obviously a question as to what extent and at what time the salient information and conclusions from the examination are made known to the PPA to enable the PPA properly to participate in the process. There is also a potential issue as to whether medical records made available to the BMR in advance of (or after) the examination are treated as part of the examination alone or as part of the evidence put forward by the recipient of the pension under para 4 which has to be submitted to the PPA as the other party to the process.
37. The position of the PPA was that it was unable to respond to the appeal because it was not to be given access to the (historic) medical evidence to be made available to the PMAB and the claimant. Its case was that if the medical evidence was to be made available to the PMAB then the claimant was relying on such evidence and pursuant to Schedule 6, paragraph 4 of the 2006 Regulations, such material had to be made available to the other party to the appeal, namely the PPA.
38. Further or alternatively, the PPA's position was that if the records were not going to be made available then the PMAB should confirm that under reg 33 the appeal was deemed to be withdrawn.
39. A hearing date was set for 25 November 2019.

40. The Report confirms that the PMAB determined that the Appellant had sufficient mental capacity to participate in the board process and to give informed consent.
41. A clinical assessment was carried out and the results of that are set out in the Report.
42. The PMAB then, correctly, set out that its function was to undertake an assessment of the claimant's degree of disablement to see if it had substantially altered since the last unchallenged assessment in 1998 with due regard to the pension regulations and the case law.
43. The Report then goes on to set out that the PMAB found that it had insufficient information to carry out its function and elected to request that it be provided with complete clinical records (occupational and GP) before providing an outcome. The Board then directed HML to request these records. It was confirmed to me on instructions that the fact that the PMAB was pursuing this course was made clear to all attendees at the hearing on 25 November 2019.
44. Its reasons for taking this course are set out in the following passage of the Report:

“The Board has carefully considered all of the information available to it and the findings at the Board hearing as detailed above. The starting point for analysing change is to have a clear idea of the status at previous assessment. This is usually detailed in the occupational health & GP records surrounding the period of injury and cessation of work; alongside the original medical referee reports and clinical findings (where done robustly). And analyses [sic] of the evolution of the medical issues over time to the present day then allows a valid assessment of how this may or may not have substantially altered. Such analysis is informed by complete GP (& specialist) records till present day (and occupational health records if there has been further involvement). There is selected clinical information available to the Board, but key aspects with regards to detailed contemporaneous clinical and functional findings were missing. Well balanced evaluation requires access to complete medical records rather than excerpts. The clinical information available to the Board is limited in this regard. It was evident to the Board that the SMP who's [sic] opinion was being challenged had more ab initio medical information than the Board. Furthermore, there had been additional clinical interactions since the SMP's 2017 paper review that the PMAB should take into account. After careful review, the PMA be found that the information available to it was not sufficient to allow it to perform its statutory function. The Board elected to request the complete clinical records (occupational and GP) before providing an outcome. The Board directed HML on its behalf to request these records.”

45. As regards the question of access to medical records, PMAB had commented earlier that the *“SMP had access to the GP records and occupational health file as noted above. Neither of these were available to the Board.”*
46. The Report also noted the usual practice in relation to provision of medical records:

“It is worth noting that Home Office guidance to PMAB's puts the responsibility for forwarding the occupational health (OH) records on the PPA's OH

Department, but that for the GP records on HML. In practice, both have usually come via the OH Department and appellant. Additionally, the applicant has subject access rights to both his occupational health records and GP records and sometimes these are provided by appellant to the PMAB independent of the PPA's submissions. In the latter situation, the records would typically be sent to the PPA when sent to the Board so as not to breach paragraph 4 of schedule 6 of PIBR 2006. However, as previously noted the appellant does not wish the PPA to have sight of these records. Letters from the applicant to his GP and the legal department of the PPA to this effect are referenced in the submissions."

47. I shall return to the question of whether the PMAB arguably reached a decision as to how to deal with the difficult question of whether and how medical records should be considered by the PMAB in circumstances where the Appellant is prepared to permit them to be made available to the PMAB and the SMP but not to the other party, the PPA. This relates to one of the asserted grounds for judicial review.

48. The actual decision of the PMAB is encapsulated by the following passages from the Report:

"After several months the Board understands that it has proven to be administratively impossible for HML to obtain these records. The specific reasons why these have proved unobtainable are not absolutely clear to the Board.

The PPA maintain that that [sic] the PMAB should draw an adverse inference from the appellant's unwillingness to have their medical records scrutinised by the PPA's non-medical representatives. Likewise, the appellant exhorts the PMAB be to draw an adverse inference from the PPA's apparent unwillingness to facilitate access to occupational health records and implores the Board to provide an outcome based on available information.

The Board does not consider that it can provide a valid answer to the statutory question due to these administrative limitations but recognises that continued delay of an outcome to the PMAB hearing is no longer tenable.

.....

Determination of the Board

The appeal is dismissed because the above administrative issues have proved insurmountable."

49. In my view, the clear decision of the PMAB was that it was not able to reach a conclusion and therefore it was not able to disagree with the decision of the SMP.

Judicial Review

50. The decision of the PMAB is dated 6 August 2020. The claimant asserts that the decision was only notified on 29 September 2019. The claim form was issued on 29 December 2019. This is outside the three month period permitted which dates from the

date of the actual decision. An extension of time is formally required but there is no application and no evidence on this point.

51. The test for the grant of permission is well known. As a convenient statement I take the test set out in the Administrative Court Judicial Review Guide 2020 that unless the court is satisfied that there is an arguable ground for judicial review having a realistic prospect of success, permission will be refused (Description of the test taken from *Sharma v Brown-Antoine* [2007] 1 W.L.R. 780).
52. Before me only three of the original five grounds are relied upon. The original five grounds were as follows:
- (1) The PMAB misdirected itself that the 2006 regulations or fairness required that all of the Claimant's medical records be disclosed to the solicitor for the Interested Party (Ground 1).
 - (2) The PMAB's position that it did not have access to the Claimant's medical records was perverse (Ground 2)
 - (3) The PMAB's position that it did not have sufficient information to determine the appeal was perverse (Ground 3)
 - (4) The PMAB failed to obtain its own legal advice (Ground 4)
 - (5) The PMAB should have, but failed to, disapprove the conduct of the SMP and/or the Interested Party in reducing the Claimant's pension from Band 4 to Band 1 without conducting any examination or interview with the Claimant or considering the cause of his early onset dementia (Ground 5).

Grounds 4 and 5

53. With regard to grounds 4 and 5, HH Judge Saffman considered that neither merited the grant of permission.

54. As regards ground 4, his summary reasons were as follows:

“(1) Neither the PMAB guidance nor the PMB circular require a PMAB to obtain legal advice. It merely indicates that the PMAB should have access to legal advice. The use of the word “may” indicates that taking legal advice is not mandatory.

(2) In any event, it seems that the PMAB had the benefit of legal advice. It is not clear on what basis it is contended in the SFG that the advice to which the PMAB referred was not directly on point. At page 4 of the PMAB report it is recorded that “HML had sought legal advice on this specific issue (access to medical records by medical versus nonmedical representation) when confronted with another appellant who gave identical restricted consent to SMP and Board and excluding the same PPA.”

55. As regards ground 5 his summary of reasons was as follows:

“It is not arguable that it is the function of the PMAB to criticise the manner in which the SMP went about her statutory task. Once the

appeal has been lodged the hearing before the PMAB is a rehearing and not a review of the SMP's decision. The PMAB in any event examined the claimant in the course of the appeal".

56. Grounds 4 and 5 are not relied upon before me.
57. Mr Rathmell, who appeared before me for the claimant, took the remaining grounds in a slightly different order. I do the same though that order differs from that put forward by Mr Rathmell.

Ground 2 : The PMAB's position that it did not have access to the Claimant's medical records was perverse.

58. The first point made is that the GP records were sent to HML (and therefore PMAB) by recorded delivery on 28 January 2020. This is confirmed by a witness statement of the Appellant made on 16 December 2020 in these proceedings. Although the witness statement does not in terms confirm whether everything by way of GP records that PMAB had requested was so provided, or that a record of delivery has been obtained, it seems to me that on the face of things there is clearly an arguable case with a realistic prospect of success that the PMAB was wrong to say that it did not have the relevant records. If its administrator/secretariat had the records then it did too. I do not know whether the position may have been complicated by the fact that, as I understand it, HML is no longer in post and that another provider now provides secretariat services to the PMAB.
59. However, it is clear that PMAB also required sight of the occupational health records. As regards that, the claimant's submission was that PPA was under an obligation to provide the occupational health records and that if they were not provided PMAB should have directed PPA to provide the same. However, as HH Judge Saffman pointed out, it was open to the appellant to provide the same. Further, PMAB had of course directed that there be a request for the same by HML but it thought that they had not been provided.
60. The position becomes even more confused because according to the acknowledgment of service filed by the PPA, no request for OH (or indeed any other) records had been received by it after the date of the hearing.
61. As regards occupational health records, the claimant's position remained as set out in its grounds in support of the claim, as repeated in the skeleton argument lodged on the morning of the hearing, at the start of the hearing before me. However, it then emerged in the course of the hearing that the claimant's case was that OH records had also been provided to HML by him after the hearing on 25 November 2020. At the time of the hearing, Mr Rathmell was unable to tell me when those documents had been sent or why this had not been raised in support of ground two much earlier. However, subsequent to the hearing, I was sent an email from the claimant's solicitor confirming that the occupational health files were sent on 17 January 2020 to the relevant email address for HML and enclosing a copy of the email.
62. My conclusions on this issue are as follows:

- (1) Although ground 2 as drafted in summary form covers the point that the PMAB was wrong to say it did not have the relevant records, the ground now put forward with regard to the occupational health records (that he claimant had sent them) was not one that was encompassed by the details setting out the ground. Reliance was solely placed upon provision of the GP records by the claimant. Accordingly, if it is to be relied upon, an amendment to the grounds needs to be sought and ordered, before the matter can be relied upon. The question of whether any amendment should be permitted is not straightforward, not least given the passage of time and the absence of an explanation as to why it was not put forward before. Accordingly, I am not prepared to widen the existing ground without considering a properly constituted application, setting out precisely the proposed amendment (which I accept has been clarified somewhat by the email from the claimant's solicitor) and any evidence and that the same is listed for hearing on notice to the PPA.
 - (2) As regards the submission that PMAB should have sought the records, the answer is that it did but it appears that its secretariat may not have done so. What happened is unclear. However, it was open to the claimant, as he now says that he did in fact do, to provide the relevant records. In those circumstances, it seems to me that there is an arguable case of perverseness in the PMAB having proceeded on the (factually correct basis as it thought it) that it had not received the relevant documents because there is at least an arguable case that HM did not in fact ask for the records. In my judgment, it is perverse to proceed on the basis there are no documents when the decision maker has previously said that it would request documents but then does not do so. At this stage I would allow this point to be raised by the existing ground 2 because it is a point taken from the interested party's acknowledgment of service. I would however urge the claimant to seek permission for a formal amendment to make the matter clear.
 - (3) Accordingly, on ground 2, I would grant permission but direct that within 7 days of the handing down of my judgment any application to amend the grounds is issued and served. That application should be listed to be heard at the substantive hearing.
63. I should add that it was also suggested by Mr Rathmell that the PMAB acted wrongly in proceeding to give its determination by way of the Report without first intimating that it was going to do so and that it did not have the relevant medical records. Whether or not a formal further hearing was necessary or at least notification of the proposed course is not a point that I need to decide at this stage but again, if this point is going to be taken (and developed) then an application to amend the grounds in this respect too will also be needed and the direction I have given about issuing an application should encompass that (and any other additional ground sought to be relied upon) too.

Ground 3: The PMAB's position that it did not have sufficient information to determine the appeal was perverse

64. I am satisfied that there is not an arguable case on this point, let alone one with any real prospect of success. It is submitted that the medical examination conducted was sufficient. It is simply unarguable that the PMAB's decision that it was insufficient was perverse or irrational. It explained quite clearly in the Report why it needed the full medical records and how they would be relevant. The obviousness of the point is also made in the passages from the judgment of Linden J that I have cited above.

65. Accordingly, permission on ground 3 is refused, essentially for the reason given by HH Judge Saffman.

Ground 1: The PMAB misdirected itself that the 2006 regulations or fairness required that all of the Claimant's medical records be disclosed to the solicitor for the Interested Party.

66. As was Judge Saffman, I am not satisfied that it is arguable that the PMAB did so direct itself. Although the Report spends some time on the issue it is clear that it did not resolve it. The approach that it sets out as having been adopted by it is one where (as, among other things, set out in the legal advice obtained in another case) "*If the Board cannot be satisfied that it has all the information from the appellant that it needs to make a fully informed decision, it will dismiss the appeal.*" That is what it did.
67. It therefore did not need to (and on my reading did not) resolve issues (by way of example) as to whether (a) if the claimant did not permit access to the PPA to the entire medical records, the records should not be considered by the PMAB (whether as a matter of procedural fairness and/or by reason of para 4 of Schedule 6) and/or because in effect the position would fall under regulation 33 (as most recently explained in the *Goodland* case) (b) whether only some more limited access (and if so what) was fair and (c) how rights under article 8 and/or Data Protection issues come into play and/or (d) what role the SMP or any appointed medical practitioner by the PPA under para 5 Schedule 6 plays in terms of the information available and its ability to pass the same onto the PPA, especially, as regards the SMP, that information she has already seen. I am not suggesting these questions are the only ones that might arise (nor indeed that they are necessarily the correct issues).
68. I do not detect in the Report any decision that the medical records were to be provided to the solicitor for the interested party (or rather the non-medical representatives of the PPA) (nor indeed that they were not to be).
69. I was also urged to give permission for judicial review on the ground that this was an area of law that the PMAB had indicated (at least twice in the Report) that it would welcome guidance from the courts. In my judgment, the court does not generally give advice in a vacuum. In the case of judicial review the procedure is directed at decisions that have been made and whether those decisions should be overturned in some manner as having been defective.
70. There is a great deal of obvious common sense underlying this position. In this particular case, resolution of the issue of access may depend a lot upon both the practice of BMRs and also upon the particular facts in this case (given e.g. the fact that the SMP seems already to have seen the GP and OH records (though probably not the more up to date ones).
71. It follows that I refuse permission with regard to ground 1, again for the reasons given by HH Judge Saffman.

Delay

72. Given my views on Ground 2, I have to consider whether delay is a factor that requires me to refuse permission. Although I decry the failure to apply for an extension of time

backed by some sort of evidence, I do not consider that it would be right for me to refuse permission on the ground of delay in this particular case.

General

73. I should add that if it emerges that the PMAB did in fact have the relevant medical records, but there seems to have been a slip between its secretariat and itself, then I would encourage the parties to consider whether to agree to a referral of the decision back to the PMAB for reconsideration pursuant to reg 32. In that event, there would then need to be a hearing of the PMAB to resolve how the issue between the parties of access to the medical records is to be resolved and, of course, there might also need to be an updated examination of the claimant.
74. Mr Rathmell made various points about the absence of evidence from the defendant regarding the processes that had taken place (or which had not) regarding the attempt to obtain medical records and the rather unsatisfactory stated position in the Report that the PMAB did not understand why it had not received the same. I have not seen relevant correspondence, if there is any, but if this needs to be taken further doubtless there can be further communication with the PMAB and reference can be made to the duty of candour as set out in the Administrative Court Judicial Review Guide.

Costs

75. I heard submissions regarding costs on the various orders that I might make. I consider that the appropriate order is that the costs order of HH Judge Saffman should be set aside and the issue of costs of the proceedings as a whole will be dealt with by the Judge at the full hearing.