

PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant : Mr W Rand
Scheme : Firefighters' Pension Scheme
Respondents : Sunderland City Council (the **Council**)
: Tyne & Wear Fire and Rescue Authority (the **Authority**)

Matters to be determined

- Mr Rand says the Council and the Authority deduct incorrect amounts of Industrial Injuries Benefit from his Injury Benefit award from the Scheme.
- He says that he has been caused distress and inconvenience by the above.

The Ombudsman's Determination of the outcome and short reasons

- The complaint should not be upheld. The regulations have been correctly applied.

DETAILED DETERMINATION

Material Facts

1. Mr Rand is receiving Injury Benefit under the Scheme.
2. Prior to 11 April 2006, Mr Rand's Industrial Injuries Benefit (**IIB**) from the Department of Work and Pensions (**DWP**) was £61.90 per week. This was based on two disablement percentage assessments of 5% and 17% totalling 22%, which count as qualifying injuries under the Scheme, and three disablement percentage assessments of 3%, 5% and 15%, totalling 23%, which do not count as qualifying injuries under the Scheme.
3. Disablement percentage assessments are added together by the DWP. If the total is between 14% and 19%, the percentage rate payable is 20%. Rates of 20% or over are rounded up or down to the nearest 10%. Mr Rand's total disability percentage assessment of 45% was, therefore, rounded up to 50%. The DWP does not specify the rate of IIB payable for each individual disability percentage assessment; it adds the individual percentages to obtain a total, which is rounded up or down to the nearest 10% and the rate is then determined on the resulting total.
4. The Council has reclaimed £30.26 per week from Mr Rand's Injury Benefit from the Scheme, this being 22/45ths of £61.90, the total rate payable by the DWP for his IIB. The ratio of 22 to 45 is based on the 22% disablement percentage assessment for the qualifying injuries and the total 45% disablement percentage assessment before rounding to 50%. Applying it to the total has the effect of apportioning the rounding of 5% between qualifying and non-qualifying injuries disablement percentage assessments.
5. The statutory basis for the deduction is The Firefighters' Pension Scheme (England) Order 2006 which came into force on 25 January 2007. Regulation 3(4) says that The Firefighters' Pension Scheme Order 1992 (the **1992 Order**) shall continue to have effect in relation to a person who immediately before 6 April 2006 was a member of it or was entitled to, or in receipt of, an award under it.

6. Rule B4 of Schedule 2, Part V, of the 1992 Order, under the heading of “Injury Awards” provides for the amounts of injury pension to be provided to a member. Rule B4(3) says:

“(1) In respect of any week for which the person is entitled to an additional benefit mentioned in sub-paragraph (2) the amount of his injury pension calculated in accordance with paragraph 1 shall ... be reduced by the amount of the benefit.

(2) The additional benefits are-

(a) so much of any disablement pension under section 57 of the Social Security Act 1975* ... as relates to the qualifying injury, together with any relevant increase, ...”

* “Disablement Pension” was changed to “Industrial Injuries Benefit” under Section 94 of the Social Security Contributions and Benefits Act 1992.

Mr Rand’s submissions

7. Mr Rand says that the regulations of the 1992 Order stipulate that only his IIB, as it relates to his qualifying injuries, with relevant increases, may be deducted from his Injury Benefit from the Scheme.
8. He contends that the deduction of 22/45ths is wrong, as it means the Council has been reclaiming part of his non-qualifying IIB. The DWP disability percentage assessment of 22% for his qualifying IIB should be rounded down to 20% and, as the rate payable for each 10% of disablement is £12.38, the deduction by the Council from his Injury Benefit should have been £24.76, a difference of £5.50 per week (£30.26 - £24.76).
9. To demonstrate what he sees as the inadequacy of the Council’s methodology, he says his non-qualifying IIB disablement percentage assessment of 5% time-expired on 11 April 2006 and using the same DWP IIB rates for the previous year, his total IIB disablement percentage assessment reduced to 40% with the amount payable likewise reduced to £49.52 per week (£12.38 x 4). The Council’s deduction became 22/40ths of £49.52 of the IIB (£27.24) and, thus, his Injury Benefit from the Scheme

increased by £3.02 per week (£30.26 - £27.24), even though the total qualifying injury disability percentage assessment of 22% had remained the same.

10. He has further suggested that a solution to his dispute should be for the deduction to be made from the Injury Benefit to be the lesser of the actual increase of the IIB or the amount of the IIB the DWP would pay alone for the qualifying injuries. Any non-qualifying injuries should be disregarded, as should the total sum of IIB payable. He gives three examples:

Example 1 – Rounding up of the total IIB figure by DWP.

Non-qualifying injury assessed at 23% - IIB rate 20%.	[£24.76]
Qualifying injury then sustained and assessed at 22% - IIB rate 20%.	[£24.76]
Total assessment 45% - IIB rate rounded up to 50%	[£61.90]

Actual deduction from Injury Benefit - $22/45\text{ths} \times £61.90 = £30.26$.

Proposed Solution

Deduction 20% [£24.76], this being the lesser of the actual IIB increase and the DWP rate (20%) payable for 22% qualifying injury alone.

Example 2 – Rounding down of the total figure by DWP.

Non-qualifying injury assessed at 8% - IIB rate 0%	[Nil]
Qualifying injury then sustained and assessed at 16% - IIB rate 20%	[£24.76]
Total assessment 24% - IIB rate rounded down to 20%	[£24.76]

Actual deduction from Injury Benefit - $16/24\text{ths} \times £24.76 = £16.51$

Proposed Solution

Deduction 20% [£24.76], this being the actual increase in the IIB and is the same as the DWP rate for the 16% qualifying injury alone.

Example 3 – No rounding of the total figure by DWP.

Non-qualifying injury assessed at 24% - IIB rate 20%	[£24.76]
Qualifying injury then sustained and assessed at 16% - IIB rate 20%	[£24.76]
Total assessment 40% - IIB rate 40%	[£49.52]

Actual deduction for Injury Benefit – $16/40\text{ths} \times £49.52 = £19.81$

Proposed Solution

Deduction 20% [£24.76], this being the actual increase in the IIB.

The Council and the Authority's submissions

11. The calculation of the IIB deduction is the correct apportionment in accordance with Rule B4 of the Scheme. The methodology has been endorsed by the Department of Communities and Local Government, which is responsible for the drafting and management of the legislation relating to the Scheme. The advice received is that so much of the IIB being received that relates to the qualifying injuries must be deducted from the Injury Benefit and this means deducting the amount being paid, including the relevant proportion of any rounding up by DWP.
12. Mr Rand was receiving IIB of £61.90 per week (50%) rather than £55.71 (45%) because of the rounding up by DWP. On the basis of the principles set out the Scheme this must mean that the excess of £6.19 per week should be apportioned on the same basis as the rest of the award, i.e. 22% qualifying injuries and 23% non-qualifying injuries.

13. The manner in which the calculation is expressed allows for both the qualifying and non-qualifying IIB to be fairly apportioned, irrespective of any rounding. Given that the rounding can be made up or down, and is the result of either qualifying or non-qualifying injuries, or both, a formula that fairly apportions the impact of these variances is the correct one to apply.

Conclusions

14. Rule B4(3)(2)(a) of the 1992 Order says that the reduction to be applied to the Injury Benefit from the Scheme shall be so much of the IIB that *relates to* any qualifying injuries. That is not exactly the same as saying that it should be *based on the disability percentage assessments* relating to those injuries.
15. The effect of Mr Rand's position prior to 11 April 2006 is that the whole of the rounding is regarded as not related to the qualifying injuries. But since, without the 22% qualifying injuries, the rounding would not have been the same as it is, it follows that it must be part attributable to it. In fact without the 22% Mr Rand would have been assessed at 20% being 3% plus 5% plus 15% = 23% rounded down to 20%.
16. Mr Rand's proposed approach works in his favour on the percentages that actually applied, but could be to his disadvantage if the percentages had been different. If the 22% had been 25%, it would have been rounded up on his argument to 30%. Yet he would still only be receiving 50% in total.
17. Put simply, the rounding only happens because of the combined assessments. On their own, the total qualifying and non-qualifying disability percentage assessments would in fact have been rounded down.
18. Mr Rand's observation that the Injury Benefit from the Scheme could change without a change in the disability percentage assessments for the qualifying injuries is correct. But that is because part of the rounding must also be treated as relating to the qualifying injuries and if the rounding changes then so does the amount related to it, whether the qualifying injury disability percentage assessment changes or not.

19. A correct and rational basis has been used to establish the amount of IBB that relates to the qualifying injuries.
20. Mr Rand's suggested solution does not fairly apportion the increased or decreased amount of IIB that would be caused by the DWP's adding up of the individual disablement percentage assessments and the subsequent rounding up or rounding down that is made to provide a total disability percentage assessment on which the rate of IIB is set. This made clear from the third example, as in that case the suggested solution makes no allowance for the member's non-qualifying injury assessment and, thus, deducts the whole of the actual IIB payable, even though the whole of the IIB does not actually relate to the qualifying injury.
21. I do not uphold the complaint.

TONY KING
Pensions Ombudsman

8 August 2008