Neutral Citation Number: 2016 EWHC 469 (Admin)

Case No: CO/3846/2015

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

The Court House
Oxford Row
Leeds LS1 3BG

Date: 07/03/2016

Before:

His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

- -

Between:

DAVID IAN SHARP	**Claimant**
- and -	
THE CHIEF CONSTABLE OF WEST YORKSHIRE POLICE	**Defendant**
- and -	
THE POLICE MEDICAL APPEAL BOARD	**Interested Party**

- -
- -

David Lock QC (instructed by **Ron Thompson**) for the **Claimant**
Ian Mullarkey (instructed by **WYP Legal Services**) for the **Defnendant**

Hearing dates: 11 February 2016

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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.

.....

Judge Behrens:

1 Introduction

1 This is an application for judicial review of the decision of the Police Medical Appeal Board ("the PMAB") dated 22nd May 2015. On that date the PMAB was reconsidering an earlier decision that it had made on 27 January 2015. Both decisions were to the effect that Mr Sharp was not entitled to be paid a pension under regulation B3 of the Police Pension Regulations 1987 ("the 1987 Regulations"). The PMAB decided that Mr Sharp was not permanently disabled within the meaning of reg A(12) of the 1987 Regulations.

2 It is common ground that Mr Sharp suffers from a recurrent depressive disorder which at the relevant time was in remission. As will appear in more detail below Mr Sharp is someone who is described by Professor Rix as having a paranoid attitude. He is liable to develop psychiatric disorder under stress. His perception, in one word, is that he has been wronged. It does not matter whether or not he has been wronged. What matters is his perception. But for his attitude, the probability is that his condition would have run a much more benign course. It is, in Professor Rix's view, inevitable that if Mr Sharp returns to work, sooner or later he will become unable to work and unable to perform the ordinary duties of a member of the force.

3 The core issue in this application is whether the PMAB were right to consider that Mr Sharp is not permanently disabled within the meaning of reg A(12).

4 Permission was granted on the papers by HH Judge Gosnell on 2nd October 2015.

5 Before dealing with the matter it is right that I should express gratitude for the very full skeleton arguments and oral submission I have received from Counsel on both sides. They have been most helpful.

2 The facts

6 Mr Sharp was born on 5th December 1963. He was a serving police officer with the West Yorkshire Police Force for a period of about 15 years from 2nd December 1996 until he resigned from the service on 4th November 2011. He was a member of the police pension fund throughout his time in office as a police officer.

7 Mr Sharp's career as a police officer was characterised by periods when he performed well as a police officer but he also had long periods off work as a result of psychiatric illnesses.

8 There is no detailed chronology setting out every occasion that Mr Sharp was off work. However a reasonable picture can be obtained from Professor Rix's report.

9 Mr Sharp suffered from anxiety on a number of occasions before he joined the police. He was in fact initially rejected by the police on medical grounds. In 2000 he was off work for 10 weeks. There were reports of stress in 2001 and 2002 but it is not clear whether he was off work. He was off work for an unspecified period in 2004 and approximately 5 months in December 2005 after the death of his father. He was suffering from stress again in September 2006 and informed his GP that the force was instituting capability proceedings. When he returned to work he was working part time. He was off work again in March 2008 for a period of approximately 7 months. August 2010 was the last time he actually worked for the police. Proceedings were instituted against him and he resigned on 4th November 2011 the day before the hearing was due to take place.

The application for a pension

10 On 21st February 2013 Mr Sharp made an application for an ill health award under reg B3 of the 1987 Regulations on the ground that he was permanently disabled from being able to perform all of the duties of a police officer.

11 As required by reg H1(2) the Chief Constable referred the decision to "the Selected Medical Practitioner", Dr Dagens.

12 Dr Dagens's decision is contained in his report dated 12th November 2013. He met Mr Sharp on that day and had access to his medical records. He recorded a diagnosis of recurrent depressive disorder but noted that Mr Sharp was functioning at a reasonable level in terms of everyday activity. He expressed his opinion in this way:

> "In my view there is no clear medical reason to conclude that [Mr Sharp] is permanently unfit for his former employment as a police officer. While he himself feels that he cannot work for his former employer, if his relationship with his former employer were neutral, there would be no medical reason to exclude him from this. I accept the points made by the psychiatrist who previously assessed him and that the nature of recurrent depressive disorder is such that he is of course at risk of further episodes in the future. This in itself however does not equate to permanent disablement as defined by the Police Pension Regulations."

13 In the result the claim was rejected.

The appeal

14 On 8th December 2013, Mr Sharp gave notice of appeal under reg H2 to the Police Medical Appeal Board ("PMAB").

Professor Rix's report

15 The appeal was supported by a report from Professor Rix, a consultant forensic psychiatrist, dated 2nd May 2014. The report is some 55 pages long. I have relied on part of it in summarising the periods when Mr Sharp was off work. Various other parts have been referred to by Counsel in the course of their submissions including the following:

> "The Appellant has suffered from psychiatric disorder since he was 25 years old. His condition has affected him intermittently. He has had periods when his mental health has been good and he has been able to function normally. He has had periods when his functioning has been impaired and he has been unable to work. Periods of breakdown have been reactive to events and circumstances in his personal life and in his employment."[1]
>
> "The appellant suffers from an affective disorder. The emotional disturbances relate primarily to his mood. When his condition first presented … he had mainly anxiety symptoms. With the passage of time his condition manifested as primarily a depressive disorder. His condition has been episodic. Hence … he has a recurrent depressive disorder."[2]
>
> "Diagnosis therefore has to take into account the interaction between on the one hand life events and circumstances and on the other hand the person who is exposed to these. This is not the history of someone with a deep-rooted predisposition to mental disorder which would have manifested at random. This was someone who would develop psychiatric disorder under stress and particularly when he perceived mismanagement, misconduct or wrongdoing. He was someone who did things by the book and expected others to do so"[3]

[1] Paragraph 5.2.1
[2] Paragraph 5.4.2
[3] Paragraph 5.4.13

> "But for the Appellant's attitude, he would have suffered little or no psychiatric disorder. The key to understanding the course of the Appellant's condition is his 'paranoid' attitude… His perception, in one word, is that he has been wronged. It does not matter whether or not he has been wronged. What matters is his perception. But for his attitude, the probability is that his condition would have run a much more benign course and would not have been an obstacle to a life-long career in the police."[4]
>
> "Although the Appellant is at this moment well-enough to resume the ordinary duties of a member of West Yorkshire police, (hypothetically if he was to return to work) it is only a matter of time before his attitude will interact with management approaches resulting in the development of a mental infirmity and an inability to work as has happened repeatedly already"[5]
>
> "It is inevitable that if the Appellant returns to work, sooner or later he will become unable to work and unable to perform the ordinary duties of a member of the force"[6]
>
> "The Appellant's core disablement is his attitude. Someone with a recurrent depressive disorder and no underlying personality [sic] can function successfully for the rest of their life. There will be no disability. Having regard to the Appellant's core attitudinal problems, it will be only a matter of time before he finds that he has hit the buffers."[7]

16 The final two paragraphs of the report were relied on by the PMAB and were as follows:

> "The primary issue appears to be whether or not the Appellant is permanently disabled. Critical to this is the Appellant's vulnerability. That vulnerability is his paranoid attitude. This is a permanent feature of his character or personality. It is when that attitude engages with management, as inevitably it would, that the Appellant would suffer a recurrence of his depressive disorder and be unable to perform all of the ordinary duties of a police officer.
>
> It therefore appears to me that the issue for the Board will be whether or not such vulnerability in itself amounts to a permanent disability for the purposes of the Regulations."

Dr Dagens's letter

17 On 2nd July 2014 Dr Dagens submitted a further letter in which he made the point that when he saw Mr Sharp in November 2013

> "… there was no clear medical reason to conclude that he was permanently unfit for his former employment as a police officer. While he himself felt that he could not work for his former employment, if his relationship with his former employer was neutral, there would be no medical reason to exclude him from this."

18 He went on to conclude:

> "Given that Professor Rix … considers him to be currently well and mentally fit to perform the duties of a police officer, there is no evidence to support that he is currently permanently disabled from performing the ordinary duties of a police officer as defined by the Police Pension Regulations."

The decision of the PMAB

19 The PMAB consisted of two consultant occupational health physicians and a consultant psychiatrist. It met on 13th January 2015. During the course of the hearing Mr Sharp

[4] Paragraph 5.4.14
[5] Paragraph 5.5.1
[6] Paragraph 5.5.3
[7] Paragraph 5.5.6

consented to have a psychiatric examination. It was concluded that he met the diagnostic criteria for recurrent depressive disorder then in remission (ICD10 – F33.4).

20 In a decision dated 27 January 2015 the PMAB rejected the Appeal. Their reasoning is contained in the detailed case discussion on page 10 of the report. In summary

1. The Board accepted that Mr Sharp suffered from a recurrent depressive disorder which was at the time of the hearing in remission.
2. The Board noted and gave the greatest weight to Professor Rix's report. It reproduced the two final paragraphs of his report and stated that the critical question was whether Mr Sharp's paranoid attitude meant that he was permanently disabled.

21 The conclusion was summarised:

> "Whilst his attitude may indeed make him more vulnerable to further episodes of depression, the Board does not consider such attitude equates to an infirmity with regards to the Police Pension Regulations. Likewise vulnerability arising from this attitude would not be regarded as permanently disabling. This is consistent with the case law on vulnerability".

Reconsideration of the PMAB decision.

22 Mr Sharp requested a reconsideration under reg H3(2) on the basis that Professor Rix's report had been misunderstood . The Chief Constable agreed to the request with the result that the application was submitted to the same Board for reconsideration.

23 In support of the reconsideration Mr Sharp relied on a further 4 page report dated 3 March 2015 from Professor Rix. Professor Rix's report included the following comments:

> "I regard [Mr Sharp's] vulnerability, in the form of his paranoid attitude as a permanent condition. By this I mean that it is more probable than not that [Mr Sharp] will have this attitude for the rest of his life[8].
>
> … it is often the case that someone with a recurrent depressive disorder stays in remission when away from the adverse events or circumstances that have precipitated previous episodes. It is often the case that re-exposure to such adversity results in a recurrence. In [Mr Sharp's] case it is inevitable that re-exposure will have this effect.[9]
>
> In short, on a balance of probabilities, if [Mr Sharp] were to return to employment in the police service, it is more probable than not that he would be permanently disabled from the normal duties of a police officer.[10]
>
> If [Mr Sharp] returned to employment in the police service, given his paranoid attitude, it is more probable than not that he would perceive management as in some way or other adversarial and it is more probable than not that this would cause a recurrence of his depressive disorder. Insofar as, time and time again, this would render him disabled from the normal duties of a police officer, it is my opinion that this is a permanent state.[11]
>
> …I would advise him against a return to work on the basis that not only would it be so highly likely that he would suffer a recurrence but more importantly he might sooner, rather than later, suffer a recurrence from which he did not make the more or less full recovery that he has hitherto made from his depressive episodes."[12]

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[8] Page 3
[9] Page 4
[10] Page 4
[11] Page 4
[12] Pages 4 and 5

24 The PMAB met to reconsider the appeal on 29 April 2015 It does not appear that the Board re-examined Mr Sharp. In its decision dated 22 May 2015 it adhered to its original view that Mr Sharp was not permanently disabled within the meaning of the 1987 Regulations. Its reasoning is contained in its Detailed Discussion. After setting out Professor Rix's view it continues:

> "The Board prefers its own specialist view that is more in accord with the Board's understanding of Professor Rix's earlier report and agrees with the view of other Board members. In the Board's view a 'paranoid attitude' is not a permanent disablement
>
> The natural history of a recurrent depression is an increasing likelihood of recurrence with further episodes; but this diagnosis by itself is not sufficient to conclude that it would render an officer permanently disabled. The additional element of a paranoid attitude does not, in the Board's view, make this a permanent disablement. Furthermore the Board does not consider that such attitude to constitute infirmity. The Board also does not consider such attitude to be immutable. The Board notes that there is no suggestion of a mental disorder such as a personality disorder. Though mention of paranoid attitude in reports may suggest possibility of a personality trait, it would not amount to a disorder in the context of this case. The Board does not agree that likelihood of recurrence and persistent illness and ensuing disability despite optimal treatment is so strong, in this instance, as to fulfil the criteria for permanent disability".

3 The 1987 Regulations

25 In the light of the submissions made on the question of causation it will be necessary to refer to the 1987 Regulations as originally enacted and also to consider the changes that have been made by subsequent regulations.

26 As originally enacted the 1987 Regulations set out the rules which covered (amongst other matters) a police officer's ill health award and a police officer's injury on duty award. As already noted the ill health award (under reg B3) applies to a police officer who retires on the ground he is permanently disabled. An injury award (under reg B4) applied to a police officer who ceased to be a member of the force and was permanently disabled as a result of an injury received without his default in the execution of his duty.

27 Reg A11 contained provisions relevant to the question of whether an injury was received in the execution of duty. It is not necessary to set it out.

28 Reg A12 in its current form provides as follows:

> "(1) A reference in these Regulations to a person being permanently disabled is to be taken as a reference to that person being disabled at the time when the question arises for decision and to that disablement being at that time likely to be permanent.
>
> (1A)…
>
> (2)…,. disablement means inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force except that, in relation to a child or the widower of a member of a police force, it means inability, occasioned as aforesaid, to earn a living.
>
> (2A) …
>
> (3) Where it is necessary to determine the degree of a person's disablement it shall be 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 a police force:
>
> …
>
> (4…

> (5) In this regulation, "infirmity" means a disease, injury or medical condition, and includes a mental disorder, injury or condition"

29 As originally enacted reg A12 did not include reg A12(5). Thus, as originally enacted there was no definition of "infirmity". There was, however, a definition of injury in Sch A in the following terms:

> ""injury" includes any injury or disease, whether of body or of mind, "injury received in the execution of duty" has the meaning assigned to it by Regulation A11 and "the result of an injury" shall be construed in accordance with Regulation A13"

30 In addition there was reg A13 which provided:

> "For the purposes of these Regulations disablement or death or treatment at a hospital shall be deemed to be the result of an injury if the injury has caused or substantially contributed to the disablement or death or the condition for which treatment is being received"

31 The injury on duty parts of the 1987 Regulations were hived off into a separate set of regulations in 2006, namely the Police (Injury Benefit) Regulations 2006. Accordingly, reg A13 and the definition of injury were repealed from the 1987 Regulations. However, by this date, the Police Pensions (Amendment) (No 2) Regulations 2003 had come into force (on 1st April 2003). These Regulations introduced reg A12(5).

4 The three questions.

32 In the light of reg A(12) I agree with Mr Lock QC that in order to determine whether an officer is entitled to an ill health award it is necessary to ask three questions:

1. Does the police officer (or former police officer) suffer from an infirmity of mind or body?
2. Does that infirmity cause the police officer to be unable to perform his duties as a police officer?
3. Is that inability to perform the duties as a police officer likely to be permanent?

33 The police officer will be entitled to an award if, and only if, the answer to each of these questions is in the affirmative.

5 Infirmity of Mind

34 It is to be noted that the definition of infirmity in reg A12(5) is wide. It includes "mental disorder, injury and condition". There is no apparent restriction on the mental disorders covered in the definition.

35 Mr Lock QC referred me to the decision of the Court of Appeal in Hatton v Sutherland [2002] EWCA Civ 76 which was a claim by employees suffering from psychiatric injuries caused by work related stress against their employers and concerned the appropriate test and approach to determine if the employer was in breach of its duty to the employee. Thus, as Mr Mullarkey pointed out, it is not a decision on the 1987 Regulations and is not directly relevant to the issues before the court. Nonetheless, as Mr Lock QC pointed out it contains some valuable guidance on the nature of work related stress.

36 The judgment of the court (comprising Brooke, Hale and Kay LJJ) was delivered by Hale LJ. In paragraphs 4 to 8 of the judgment she considers the nature of psychiatric ill health by referring to passages from the Law Commission Consultation Paper (1995) and Report (1998) on Liability for Psychiatric Illness. In paragraph 4 she cites from the Consultation Paper:

> "We are aware from our preliminary consultations that there are strongly held views on this topic. On the one hand, there are those who are sceptical about the award of damages for psychiatric illness. They argue that such illness can easily be faked; that, in any event, those who are suffering should be able to 'pull themselves together'; and that, even if they cannot do so, there is no good reason why defendants and, through them, those who pay insurance premiums should pay for their inability to do so. . . . On the other hand, medical and legal experts working in the field, who are the people who most commonly encounter those complaining of psychiatric illness, have impressed upon us how life-shattering psychiatric illness can be and how, in many instances, it can be more debilitating than physical injuries."

37 In paragraph 5 of the judgment she comments on the differences between physical and mental disorders including:

> "(2) While some of the major mental illnesses have a known or strongly suspected organic origin, this is not the case with many of the most common disorders. Their causes will often be complex and depend upon the interaction between the patient's personality and a number of factors in the patient's life. It is not easy to predict who will fall victim, how, why or when."

38 Mr Lock QC relied on this passage as relevant to Mr Sharp's condition.

39 Paragraphs 7 to 10 of the judgment are concerned with occupational stress. Hale LJ refers to three documents which she describes as particularly helpful. She set out the definition of stress in each of them including (at paragraphs 9 – 10)

> Stress is defined (p 4) as 'the reaction people have to excessive pressures or other types of demand placed upon them. It arises when they worry that they can't cope.' It can involve both physical and behavioural effects, but these 'are usually short-lived and cause no lasting harm. When the pressures recede, there is a quick return to normal.'
>
> > "Stress is not therefore the same as ill-health. But in some cases, particularly where pressures are intense and continue for some time, the effect of stress can be more sustained and far more damaging, leading to longer-term psychological problems and physical ill-health."
>
> 10. Two other important messages emerge from these documents. First, and perhaps contrary to popular belief, harmful levels of stress are most likely to occur in situations where people feel powerless or trapped. These are more likely to affect people on the shop floor or at the more junior levels than those who are in a position to shape what they do. Second, stress – in the sense of a perceived mismatch between the pressures of the job and the individual's ability to meet them – is a psychological phenomenon but it can lead to either physical or mental ill-health or both. When considering the issues raised by these four cases, in which the claimants all suffered psychiatric illnesses, it may therefore be important to bear in mind that the same issues might arise had they instead suffered some stress-related physical disorder, such as ulcers, heart disease or hypertension.

40 I have no hesitation in accepting the guidance in these paragraphs.

41 The meaning of "infirmity" in reg A12(5) was considered by Bennett J in R (Northumbria Police Authority) v Broome [2006] ICR 555. Bennett J held that a vulnerability to anxiety was neither a disease nor an injury nor a condition recognised by medicine and thus a claim to a disablement pension based on such a vulnerability failed.

42 In paragraph 26 of the judgment he said:

> "The second question raises difficult issues of construction. Mr Wilcox's submissions can be summarised thus. "Vulnerability", "enmity", and "intractable antipathy" do not appear in internationally authoritative guides available to doctors such as ICD-10 and DSM IV. A distinction must be made between a symptom and a condition. If a police officer is only

> "vulnerable" there is in fact nothing wrong with him provided that the vulnerability has not in effect crossed the line into a condition. Regulation A12(5) of the Regulations defines infirmity, so far as the instant cases are concerned, as a medical condition. The word "medical" is important because one must look to see if the "condition" is a condition recognised in the medical world. For that purpose there can be no better guide than by looking at internationally recognised, medical conditions. "Vulnerability" is not within ICD-10 or DSM IV; indeed, so far as the evidence goes in the instant cases, it is not within any international, medical, authoritative guides. The same reasoning must apply to "intractability" and "enmity".

43 Mr Mullarkey submits that this assists the Chief Constable. He points out that Mr Sharp is currently in remission he has simply a vulnerability to future episodes of depression. Mr Lock QC on the other hand points out that Mr Sharp does have a recognised medical condition – ICD10 – F33.4 – and that this was accepted by the PMAB in their original decision. Thus this case is distinguishable from Broome. It has crossed the line into an infirmity.

44 It is to be noted that the question that the PMAB asked itself in its original decision was whether Mr Sharp's attitude equates to an infirmity within the meaning of the 1987 Regulations. Perhaps unsurprisingly it decided that it was not. Mr Lock QC submits that this is the wrong question. Having accepted that Mr Sharp suffered from a recurrent depressive disorder it should have held that there was an infirmity within the meaning of reg A(12)(5). It was unnecessary (and irrelevant) to consider whether Mr Sharp's attitude was also an infirmity. As Professor Rix makes clear, (particularly in the passage cited at paragraph 5.4.14) Mr Sharp's attitude is a cause of the disorder and its severity not the disorder itself. In its initial report the PMAB attached "great weight" to Professor Rix's first report and appear to have accepted it.

45 A similar criticism can be levelled at the reconsideration. There, the PMAB held that a 'paranoid attitude' is not a permanent disablement and that such an attitude does not constitute an infirmity. It is again regarding the paranoid attitude as the disorder.

46 Mr Mullarkey sought to justify the decision on the basis of the decision in Broome and the undoubted expertise of the PMAB. He drew my attention to the need for this court to pay respect to the decision of an expert tribunal. He cited a passage from R (Sidwell) v Police Medical Appeal Board v The Chief Constable of the Derbyshire Constabulary [2015] EWHC 122 (Admin), where Mostyn J began by making a number of observations, including, at paragraphs 5 that:

> "It is trite law that this court will pay considerable respect to the decision of an expert and informed tribunal, and will only interfere where the grounds of challenge are clearly made out: see *Law Society v Salsbury [2008] EWCA Civ 1285 [2009] 1 WLR 1286* per Jackson LJ at para 30."

47 I prefer the submissions of Mr Lock QC. I am satisfied that the PMAB ought to have held that Mr Sharp's recurrent depressive disorder was an infirmity within the meaning reg A(12)(5). It was unnecessary and wrong to go on to consider whether his paranoid attitude was also an infirmity. It was a cause of the infirmity not the infirmity itself. I agree with Mr Lock QC that Mr Sharp had indeed crossed Bennett J's line and was a recognised medical condition.

48 It may be that the PMAB misinterpreted the final two paragraphs of Professor Rix's first report. To my mind those paragraphs are directed to the question of whether Mr Sharp's disability is permanent and not whether there was a disability at all.

6 Causation

49 The second question is whether that infirmity caused Mr Sharp to be unable to perform his duties as a police officer.

50 In the light of R v Sussex Police Authority ex parte Stewart [2000] EWCA Civ 101 375 it was common ground between Counsel that the reference in reg A12(2) to a police officer being able to "perform the ordinary duties of a member of the force" means being able to perform all of the ordinary duties of a member of the force. It is thus unnecessary for me to refer to that case in any detail.

51 There was, however, a difference between Counsel as to whether the infirmity needed to be the sole or merely a significant cause of Mr Sharp's inability to perform his duties as a police officer.

52 Thus in paragraph 4.10 of his skeleton argument Mr Mullarkey puts the point in this way:

> It is not accepted … that "if an inability to perform the duties of a police officer is caused by multiple factors working in combination, as a matter of logic each of those factors must be a material cause of the outcome." Such an approach, it is submitted, would inevitably lead to the Regulations being misapplied. The Regulations are clear: the officer's disablement must be occasioned by the officer's recognised medical condition and the Regulations do not extend to include incapacity caused by a combination of medically recognised and non-medically recognised conditions, or by the interaction between any such conditions. To import such a definition would require reading words into the Regulations and alter the underlying rationale of the Regulations.

53 Mr Lock QC sought to deal with this submission in a number of ways. First he submitted that it applies a causation test which is novel and unknown in any other legal context. Second he submitted that this is not how the 1987 Regulations were set up.

54 It will be recalled that as originally enacted the 1987 Regulations applied to both ill-health and injury on duty awards. They did not include what is now reg A12(5) but did include reg A13 and a definition of injury which included mental injury or disease. Thus under the original form of the regulations Mr Sharp's recurrent depressive disorder would have been an injury. There was, at that time, no definition of infirmity but Mr Lock QC submitted that there is little doubt that recurrent depressive disorder would have been treated as an infirmity of mind within reg A12(2). He submitted that under reg A(13) Mr Sharp's disablement would have been deemed to be the result of an injury if the injury had caused or substantially contributed to the disablement.

55 Mr Lock QC referred me to a passage from Collins J in R (Commissioner of Police of the Metropolis) v The Police Medical Appeal Board [2013] EWHC 1203 (Admin) who said at §28:

> "The true question is indeed whether at the relevant time the injury has substantially contributed to the permanent disability. Whether it has will be a question of fact which is likely to turn in most cases on the seriousness of the injury and its effects. Only if there will be no loss of earning capacity resulting from the injury when the officer is medically retired will it be likely to be the case that there was no substantial contribution"

56 Mr Mullarkey sought to meet this argument by pointing out that reg A(13) referred to injury rather than infirmity and that it had been removed from the 1987 Regulations when the injury awards were hived off into separate regulations. He accordingly submitted that reg A13 only applied to injury on duty awards.

57 I prefer the submissions of Mr Lock QC. As he pointed out, there was one scheme covering the two types of award. It seems to me highly unlikely that Parliament can have intended a different test for causation in ill health awards and injury on duty awards. Furthermore as the court pointed out in Hatton, the causes of psychiatric injury will often be complex and depend upon the interaction between the patient's personality and a number of factors in the patient's life. If Mr Mullarkey's submission is correct it will lead in mental infirmity cases to impossibly difficult questions of causation with the police officer often failing to prove that his infirmity was the sole cause of his inability to perform his duties.

58 The decisions of the PMAB do not deal with the causation issue in any great detail. In the first report it notes Professor Rix's analysis and suggests that he makes a distinction between the recurrent depressive disorder and the attitude clarifying that the recurrent depressive disorder does not permanently incapacitate him from the ordinary duties of a police officer.

59 To my mind this is to misinterpret paragraph 5.14.4 of Professor Rix's report. Mr Sharp's paranoid attitude is one of the causes of the severity of the recurrent depressive disorder.

60 In its second report it combines the causation question with the permanence question. It does not seek to answer the question whether the recurrent depressive disorder causes Mr Sharp to be unable to carry out the normal duties of a police officer.

61 Having regard to the extensive periods off work when the recurrent depressive disorder is not in remission my own view would be that during those periods he was unable to carry out those duties. On the other hand as Professor Rix pointed out in paragraph 5.5.1, when in remission he is well-enough to resume those duties. If he returns to work it is, however, only a matter of time before the recurrent depressive disorder will recur.

62 In paragraphs 47 to 54 of his skeleton argument Mr Lock QC considers the meaning of the word "perform" in reg A12(2) in the context of an intermittent disability. He submits that some assistance can be gained from page 29 of the Equality Act 2010 guidance which provides:

> "The Act states that if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, a substantial effect is treated as continuing if it is likely to recur…… Conditions with effects which recur only sporadically over short periods can still qualify as impairment the purposes of the Act, in respect of the meaning of "long-term"

63 This led him to submit that any "substantial" inability to perform any of the duties of a police officer as a result of the infirmity must enable an officer to be classified as disabled.

64 To my mind this is a sensible approach and is consistent with my view in relation to sole/substantial cause. However it does require the PMAB to form a view as to whether the inability is substantial. That no doubt requires an assessment of the effect of the disability when not in remission and the likelihood of recurrence.

65 It is plain that the PMAB have not attempted this assessment in either of their reports.

7 Permanence

66 The third question is whether Mr Sharp's inability to perform the normal duties of a police officer is permanent.

67 I have set out the relevant part of the second report of the PMAB. In summary its view was:

1. A 'paranoid attitude' is not a permanent disablement
2. Diagnosis of a recurrent depression by itself is not sufficient to conclude that it would render an officer permanently disabled
3. The additional element of a paranoid attitude does not, in the Board's view, make this a permanent disablement.
4. The Board also does not consider such attitude to be immutable.

68 Mr Mullarkey seeks to rely on this reasoning as that of an expert panel with which this court should not interfere. He reminded me that the panel included one consultant psychiatrist.

69 A number of points can be made about the PMAB's reasoning:

1. For reasons set out above I do not regard the question whether a paranoid attitude is an infirmity as relevant to the issues before the PMAB. The paranoid attitude was one of the causes of the severity of the recurrent depressive disorder suffered by Mr Sharp.
2. I entirely accept that a recurrent depressive disorder may not of itself be a permanent disablement. On the other hand it may. The question for the PMAB was whether on the facts of this case Mr Sharp's recurrent depressive disorder was sufficiently serious to amount to a permanent disablement. That involves a consideration of the effect on Mr Sharp of previous incidents of recurrent depressive disorder, the likelihood of recurrence if Mr Sharp returns to work as a police officer, the likely effect on Mr Sharp of future incidents including the extent to which he is likely to recover from any further incidents. This is plainly a matter for the PMAB but there is no indication in the reports that it has considered these matters. I accept, as Mr Mullarkey pointed out that the reports are not written by lawyers and should not be construed as legal documents. However they should be written so that those reading the reports can understand the basis for the decision.
3. The statement that the PMAB did not consider the paranoid attitude immutable is to my mind problematical for a number of reasons. First, it is inconsistent with the penultimate paragraph of Professor Rix's first report which describes the attitude as "a permanent feature of his character or personality". The PMAB expressly attached great weight to Professor Rix's first report and in its first report quoted this paragraph. There is no indication in the second report of what caused the PMAB to change its mind. It did not re-examine Mr Sharp for the second report. Whilst I accept that, as a specialist tribunal the PMAB was entitled to change its mind I agree with Mr Lock QC that Mr Sharp was entitled to know the reasons why the PMAB decided that it was not immutable in Mr Sharp's case. On this point the second report is silent. Second, as Mr Lock QC pointed out the report contains no assessment of the likelihood of Mr Sharp's paranoid attitude changing prior to his 60th birthday (the normal retirement date). If the likelihood is very small then it would not prevent Mr Sharp's disability being permanent. Thus the statement that the paranoid attitude is not immutable is insufficient to determine the permanence of Mr Sharp's disability.

8 Conclusion

70 For all of the above reasons this application succeeds. I would quash the decision of the PMAB and direct a rehearing before a differently constituted tribunal.