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Dear Sir or Madam

SCOTTISH FIRE SERVICE CIRCULAR No 5/2005

FIREFIGHTERS PENSION SCHEME (FPS)

This circular covers:

- (1) Changes to the ODPM Commentary (Rule H2) following the revised guidance provided in Scottish Fire Circular 5/2004;**
- (2) Protection of Pensionable Pay;**
- (3) Injury Awards and Apportionment.**

This circular should be brought to the attention of your fire authority, pension managers, brigade medical officers/occupational health managers, Human Resources and active members of the FPS

1. Amendments to Rule H2 and Annex 7 based on Scottish Fire Circular 5/2004

1.1 Changes to the management of medical appeals outlined in Scottish Fire Circular 5/2004 have now been reflected in changes to the Commentary on the FPS on the ODPM website: (www.odpm.gov.uk access : Fire > Fire and Rescue Service > Pensions > Firefighters' pension scheme commentary). The Commentary provides guidance on the FPS rules together with standard forms and letters referred to in this circular.

1.2 Key changes relate to:

- **Updating the venues available:** Further venues have been added. Please note that the hearing will be held at the most convenient venue for the relevant fire authority and the appellant.

- **Notification of hearing date:** Although paragraph 4(2) of Schedule 9 of the FPS specifies ‘not less than 21 day’s notice’, the contract with BUPA for the provision of the Board of Medical Referees requires that 2 months notice be given. The purpose of this extension is to reduce the number of cancellations.
- **Dates of availability:** In practice, ODPM have found that because of the time lapse between completion of the notice of appeal and receipt of the relevant papers in ODPM the 2 – 4 months period of available dates previously requested has already passed. The dates now look ahead for 6 months from the date of completion of the form. Fire Authorities (FA) are asked to give their availability on form H2 – Form 2A.
- **Grounds of appeal:** The notice of appeal form H2 – Form 1 (page 15 of the Commentary guidance on Rule H2) has been amended to allow more room for the grounds of appeal to be set out. Appellants are expected to give sound justifications for their appeal and to provide supporting evidence. It is insufficient to say that they simply disagree with the decision.
- **Question to be addressed: H2-7** (page 7 of guidance on Rule H2) has been expanded to stress the importance of the question being agreed by all parties prior to the hearing and to include the action taken by ODPM to ensure that this is done. Changes to the question as agreed with ODPM will not be possible at the hearing.
- **Proforma “Annex A”:** This form was introduced in guidance contained in Scottish Fire Service Pension Circular 5/2004 and provides personal details about the appellant. FAs are currently failing to complete this form when submitting appeals to ODPM. In future the forwarding of papers by ODPM will be delayed until this has been received. The form can be found at H2-Form 2A headed “Information for Board of Medical Referees” (Pages 18-19 of the Commentary guidance on Rule H2). This also asks for the dates of availability of FA staff.
- **Certificates for completion by the Service Medical Adviser and the Independent Qualified Medical adviser:** When considering the forms to be completed FAs are not being selective enough and the most appropriate form is not always being used. A common problem is that the medical practitioner does not give a view on whether or not an injury is qualifying but all the correspondence from the FA, and often the grounds of the appeal, relate to this question. The front page of Annex 7 has been amended to list all the forms and their purpose. This can be found on page 1 of Annex 7 in Annexes of related matters in the Commentary.
- **Model Certificates A, B, C, D, E, F and G** have been amended to reflect the fact that it is not a requirement for the IQMP to examine the firefighter. This is a matter for the judgment of the IQMP in the circumstances of the case.
- **Certificate amendments to incorporate requirements of the DDA :** Changes have been made to **Certificate A, B and G** to reflect the requirements of the DDA and changes to the definition of regular firefighter. Where the medical practitioner is required to give an opinion on the firefighter’s ability to perform the duties of a regular firefighter the question has been broken into two. The first reading “The firefighter is/is not disabled from engaging in firefighting” and the second “the firefighter is/is not disabled from performing the duties of a regular firefighter (additional to engaging in firefighting)”. This now also asks the IQMP’s opinion as to the firefighter’s ability to carry out all or any duties associated with the role. When considering alternative roles those under consideration will need to be identified by HR before referral to the IQMP.

- **Degree of disablement** : Information on this form has been amended to clarify how the degree of disablement has been arrived at and apportionment attributed. Many appeals arise because the appellant does not understand how the degree of disablement has been assessed and it is worth spending time with the appellant to explain this fully when the decision is given. HR should be identifying pay in alternative jobs and performing the calculation. IQMP/medical staff will be confirming medical fitness for alternative roles/jobs.
- **Requirements for submission of written evidence:** This clarifies the position and responsibilities, particularly with regard to late evidence.
- **Receipt of the report of the outcome of the hearing:** A variation to the BUPA contract extends the period for the submission of the Board’s report from 10 to 15 working days and varies the penalty to a reduction in fee of £200 when the 15 day target is missed and thereafter £200 for each additional 5 working days. It is hoped that this will reduce the number of late reports.
- **Consent Form:** Following advice from ODPM’s Legal Adviser, reference to the fact that relevant medical information will be available to the representatives of the FA responding to the appeal has been added. Once a person appeals they may be assumed to have waived their right to medical confidentiality for the purposes of the appeal – and the responding FA would be entitled to full disclosure of any relevant papers including medical records. Secondly the medical records can contain information which the FA (HR Department) will need to check, e.g. whether the appellant had attended incidents as claimed. It has come to ODPM’s attention that some FAs only learn about these indexed events at the appeal hearing.

FAs have also stated that some firefighters are refusing to give consent for the release of medical records to the IQMP. In such cases the appeal should be considered under H1 (3), i.e. the FA should decide upon the information available. We will consider whether further amendments are required to the FPS to clarify the position in such circumstances.

2 Protection of Pensionable Pay

2.1 Schedule 1 of the Firemen's Pension Scheme Amendment (Scotland) Order 2004 (SSI 2004/385) amended the definition of “Regular firefighter”. From that date an FA can consider whether a firefighter who is permanently unfit for firefighting duties would be suitable for any other duties (appropriate to the role) before deciding whether ill-health retirement should apply. FAs may be considering re-deployment to posts which attract lower rates of pay than those for firefighting: the reason for such lower pay is that non-operational staff are employed in these jobs and equal pay considerations apply.

2.2 There would be an impact on pensions in that the FPS is a “final salary” pension scheme. Benefits are calculated on the basis of the best of the last three years of service. If the pay in these final years is less than pay received earlier in the period of Scheme membership, a lower level of benefits would result. The benefits would not reflect pay received and contributions deducted before the pay reduction. Payments made under death and injury compensation provisions, which also rely on average pensionable pay would also be affected.

2.3 In such circumstances, an option had been proposed to allow protection of pensionable pay through use of a certificate of protection similar to that available in the Local Government Pension Scheme (*Regulation 23*). Under this proposal, a firefighter would have been able to obtain a certificate and to decide whether the pension benefits should be calculated using either (a) any one of the last 5 years of pensionable service; or (b) the annual average salary of any three consecutive years from the last 13 years of pensionable service.

2.4 However, after consultation with the Firefighters Pension Committee, where a view was expressed that the proposed amendment was unnecessary, it has been withdrawn although the right to bring it forward within the next three years if it is clearly in the interests of firefighters is reserved.

3 Injury awards and apportionment

3.1 A copy of a guidance note on the use of apportionment in injury benefit cases is attached in Annex A.

4 Enquiries

4.1 If you have any queries regarding the content of this circular then you should contact the SPPA as follows:

Jim Preston tel 01896 893223 or E-mail james.preston@scotland.gsi.gov.uk

Dorothy Hamilton tel 01896 893224 or E-mail Dorothy.hamilton@scotland.gsi.gov.uk

If you have a query regarding an appeal that has already been submitted to ODPM then the contact details are:

Medical appeals: Maggie Smith tel 020-7944-6787 or E-mail maggie.smith@odpm.gsi.gov.uk

Medical Appeals and general enquiries Anthony Mooney tel 020 7944 8087 or E-mail: anthony.mooney@odpm.gsi.gov.uk

Yours sincerely

Jim Preston
Policy Manager

INJURY AWARDS AND APPORTIONMENT

Note by the Office of the Deputy Prime Minister

Introduction

A firefighter is entitled, under Rule B4 of the FPS, to an injury award if he/she is retired due to permanent disablement which has been caused or substantially contributed to by a qualifying injury. The award is made up of a gratuity which is a single, lump sum payment and an injury pension which is any balancing payment to ensure a minimum income guarantee.

Under Rule A10(3), the payments in both elements of the award depend upon the firefighter's degree of disablement, which in turn is determined by the degree to which his/her earnings capacity has been affected as a result of the qualifying injury.

When factors other than the qualifying injury have contributed to the reduced earnings capacity an *apportionment* of causes is necessary to determine the degree of disablement which has resulted from the qualifying injury.

Apportionment features in most compensation schemes that rely on cause as a basis for entitlement and it is well established as a necessary part of the injury assessment process under the FPS. However, in some cases questions arise about the nature and extent of its application.

Apportionment in principle

Because injury and disease often result from a combination of causes, most occupational compensation systems use apportionment in one way or another to avoid liability for non-occupational factors.

In the context of the FPS, the legal basis for apportionment is contained within Rule A10(3) which states:-

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 a qualifying injury; if, as a result of such an injury, he is receiving in-patient treatment at a hospital he shall be treated as being totally disabled.

The principle of apportionment has been affirmed in guidance and advice issued by ODPM (Commentary on the FPS - see Appendix 1 to this Note).

Apportionment featured as an integral part of the assessment process advanced by ALAMA at a seminar on pension issues in 1997. The ALAMA approach has since been applied by many FAs and has been accepted as a logical basis for assessment by the medical appeal boards.

Against this background, and in the absence to date of any legal challenge to the principle, apportionment appears firmly established as a necessary and valid part of the FPS injury award assessment process.

Application of Apportionment

Although the principle of apportionment is well established, questions may arise over the nature or extent of its application in some cases.

When disablement and reduced earnings capacity have resulted from a combination of medical conditions distinguishable by separate diagnoses, one of which is solely attributable to a qualifying injury (i.e. under Rule A9 (1) "*an injury received by a person without his own default in the execution of his duties as a regular firefighter.*") and the other to a non-occupational cause, the case for apportionment is clear.

However in a majority of cases, when a qualifying injury is accepted, only one medical condition is identified and cited on the certificate of permanent disablement. Should apportionment be considered in these cases?

The prevailing view is that apportionment should still apply when only one medical condition is cited on the medical certificate if, in addition to the qualifying injury, non-occupational factors have contributed significantly to the disablement.

This view is supported by the following two considerations:

1. The information on the causal attribution of the disablement provided by the Certificate of Permanent Disablement (CPD) is limited to confirmation that a qualifying injury, associated with the medical condition identified, satisfies the threshold required by Rule A11(2), i.e. that the qualifying injury caused or substantially contributed to the permanent disablement from firefighting.

The information required for the CPD does not exclude the possibility that medical conditions other than the one identified may also have contributed to the disablement nor the fact that the cause of the medical condition identified, may also be attributable to many factors other than the service injury. In other words the diagnosis stated on the CPD is insufficient to draw reliable conclusions on the issues involved in the application of Rule A10 (3).

2. In the practice of medicine many diagnoses are based on the identification of conditions by their symptomatology and history. Broad diagnostic terms such as depression or osteoarthritis reflect the effects of the condition but not their cause.

Aetiology is the branch of medicine concerned with the study of cause. It follows that to use diagnosis as the sole means for assessing causal issues may not only circumvent any proper assessment of cause, it could also preclude the informed application of relevant medical knowledge.

It is also noteworthy that a review of assessment of entitlement to injury awards under the FPS, following a wider analysis of the apportionment issue, concluded that the above application was necessary to achieve consistency with other schemes and to avoid the potential for excessive levels of over-compensation.

Apportionment in Practice

The following are examples of cases involving a single condition that would warrant an apportionment:

- a firefighter with osteoarthritis of the knee, associated with a long history of sporting injuries, which is aggravated by a qualifying injury to an extent which results in permanent disablement.
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- a firefighter with a history of recurrent depression and anxiety who becomes disabled following the development of post traumatic stress disorder associated with a relatively routine, albeit distressing, RTA.

How should such cases be apportioned in practice? This is a primarily a matter for medical expertise and the following model has been offered by ALAMA as a guide to good practice.

1. **Consider the aetiology of the disablement:** *review the aetiological processes and factors that may have contributed to the disablement by reference, as necessary, to reputable texts and relevant peer-reviewed journal articles.*
2. **Consider history, medical evidence and other relevant evidence:** *review OH records, hospital records, GP records, accident records, sickness absence records and any other relevant evidence and undertake further medical assessment of patient if necessary.*
3. **Identify qualifying occupational factor(s):** *ensure all relevant qualifying occupational aetiological factors are included (see “Points to note” below).*
4. **Determine relative contribution(s) of qualifying factor(s):** *ascribe qualifying occupational factor(s) a % contribution to the disablement and total as necessary to establish combined contribution of qualifying occupational factors to disablement.*

The % figure resulting from 4 above represents the **apportionment** . This figure should be applied to the % *reduced earnings capacity* to establish the degree of disablement (see Appendix 2).

Points to note

(i) A qualifying injury is defined in the FPSO Rule A9 as “*an injury received by a person without his own default in the execution of his duties as a regular firefighter.*” The FPSO acknowledges that “injury” includes disease. In addition case law has acknowledged that the accumulative effect of successive traumas may be regarded as a qualifying injury. The term “factor(s)” in 3 above is used to reflect these acknowledgements.

(ii) However not all the aetiological factors which may be regarded as occupational in the context of the fire service are necessarily qualifying factors under the FPS and it may therefore be necessary to make a distinction between those that are qualifying and those that are not.

Further details of the Rules relating to qualifying injuries and references to relevant cases are given in the Commentary on the FPS.

(iii) Determination of *reduced earnings capacity* is a management responsibility and should be undertaken in accordance with guidance issued in Part A of Scottish Fire Service Circular 7/2002.

(iv) It may be necessary to seek specialist medical advice or opinion to inform assessment issues arising in steps 1 and 4 above.

(v) All practitioners relying on professional judgement (i.e. opinion evidence) to address assessment issues within the above steps should document the basis of any judgement/opinion submitted.

February 2005
Fire Legislation, Safety and Pensions Division
Office of the Deputy Prime Minister

**FIREFIGHTERS' PENSION SCHEME - COMMENTARY –
see also annex to Scottish Fire Circular 7/2002**

Apportionment features on the model medical certificates B, D and F given at Annexe 7 of the Commentary and guidance on completion of each of these certificates is given in the Annexe. The Annex to Scottish Fire Circular 7/2002 included the following guidance which has been amended updated in the Commentary to take account of the introduction of an independent qualified medical practitioner:

Page 4: Apportionment of contribution of injury to disablement

This is for completion by the medical practitioner only if, in respect of Point 5 on Page 2, he/she states that the disablement has been occasioned by an injury received without the firefighter's own default in the execution/exercise of duties, etc. If not relevant, the medical practitioner should draw a line through this section and mark "Not Applicable".

The medical practitioner can indicate here to what extent the injury, if it should be considered a "qualifying injury", contributed to the disability.

For example, the medical practitioner may be of the opinion that that some other injury which cannot be classed as qualifying (e.g. off-duty) was the main cause of the disability, whereas the injury which may be considered as qualifying simply exacerbated it.

The fire authority will need to know this because, when they assess the degree of disablement, they must do so by reference to the degree to which) the earning capacity has been affected as a result of the qualifying injury; if the earning capacity has been affected as a result of something else, this should be noted for assessment purposes.

**EXTRACT FROM ALAMA PRESENTATION
AT PENSION SEMINAR LECTURE 1997**

Six Steps in Assessing Degree of Disablement

- 1 Establish Permanent Disablement (PD)
- 2 Confirm Qualifying Injury (QI)
- 3 Apportion contribution of QI to PD (%)
- 4 Identify functional limitations of PD
- 5 Determine reduced earnings capacity (REC) due to functional limitation (%)
- 6 Apply 3 to 5 for Degree of Disability

Degree of Disablement = % PD due to QI x % REC due to PD

or

Degree of Disablement =

occupational attribution of permanent disablement (%) x reduced earnings potential (%)

The above approach was advanced in the lecture entitled '*Assessing Disablement and Qualifying Injuries*' given by the ALAMA CFBAC Pensions Subcommittee representative at the Cumbria Fire Service Pension Seminar, October 1997. It has since been applied by many FAs and has been accepted as a logical basis for assessment by the Boards of Medical Referees under Rule H2 of the FPS.