RULE A10
Disablement

Rule A10 explains the meaning of "disablement".

The meaning of disablement in the case of a firefighter

Rule A10(2) explains that in the case of a firefighter, disablement means incapacity, occasioned by infirmity of mind or body, for the performance of duty.

The meaning of disablement in the case of a child

Rule A10(2) also explains that if it is necessary to assess whether or not a child is disabled – eligibility for children's benefits in certain cases depends upon this – disablement means incapacity, occasioned by infirmity of mind or body, to earn a living.

The meaning of permanent disablement

According to Rule A10(1), you (or a child) are permanently disabled if, at the time the question of disability arises for decision, your disablement is considered likely to be permanent. This obviously depends upon the medical evidence available at the time (see "Medical questions" in the explanation of Rule H1 and "Points To Note", below.)

Rule A10(1A) says that when a fire and rescue authority have to determine whether a disablement is permanent they should have regard to whether it is likely to continue until the person's normal pension age. This is defined in Rule A13 as age 55 (see "Points To Note", Point 3 for the definition before 21 November 2005).

Date of disablement

Rule A10(4) states that if you retire before you become disabled and the date at which you became disabled cannot be established, the date of disablement will be taken to be the date on which you first made your claim of disablement known to the fire and rescue authority.

Archived pages

With effect from 1 April 2006, Rule A10 was amended to remove those parts that related to disablement and injury. This was because the Firefighters' Compensation Scheme ("FCS") came into effect on that date. The relevant provisions were moved from the FPS to the FCS. In case you need to refer to the provisions of Rule A10 as they stood immediately before 1 April 2006, the pre 1 April 2006 explanation of Rule A10 is attached as "archived" material.

Useful reference source

- FSC 3/2003: offered an interpretation of "permanently disabled" in advance of the introduction of Rule A10(1A)
- FSC 30/2004: definition of "permanent"
- FPSC 4/2005: explains replacement of compulsory retirement age with normal pension age
- FPSC 11/2006: amendment to guidance given in FSC 30/2004

Rule A10 (continued)

Points To Note

1. If you are considered to be permanently disabled, Rule A15 allows your fire and rescue authority to retire you. Retirement under Rule A15 allows an ill-health award to be paid under Rule B3 "Ill-health awards".

2. There are two tiers of ill-health award allowed under Rule B3 –

   - lower tier, where a person is disabled for the performance of duty appropriate to role but could undertake other regular employment
   - higher tier, where a person is disabled for the performance of duty appropriate to role and incapable of undertaking any regular employment.

   Consequently the fire and rescue authority will seek a medical opinion on the extent of the disablement. The medical opinion will be given by an independent qualified medical practitioner (see the explanation in Rule H1).

3. Rule A10(1A) – the use of compulsory retirement age (as defined by Rule A13) as a test of "permanence" – was added to the FPS with effect from 13 September 2004. At that time, Rule A13 defined compulsory retirement age as age 55 for all ranks up to and including Station Officer, age 60 for all ranks Assistant Divisional Officer and above. (If an extension of service had been allowed by the authority, compulsory retirement age would be the date/age of the firefighter at the end of that extension.) On 21 November 2005, Rule A13 was amended to remove the reference to compulsory retirement age and to replace it with "normal pension age". This is age 55 regardless of the rank/role of the firefighter. Although the majority of cases will be considered before normal pension age, occasionally a case of "after-appearing" injury (see the Firefighters' Compensation Scheme) may need to be considered after the firefighter has attained age 55. The wording of Rule A10(1A) is not intended to exclude consideration of cases where the question of permanent disablement, as caused or substantially contributed to by a qualifying injury, does not arise until after normal pension age.

4. Before 13 September 2004 the definition of "regular firefighter" and therefore access to the FPS was based on the inclusion, in your terms of appointment, of a requirement to engage in firefighting. If you were subsequently found to be unfit for firefighting it was expected that you would be dismissed from the service even if, at that time, "firefighting" was a limited part of your duties and/or you remained perfectly fit to undertake all other duties of your rank/role. With effect from 13 September 2004 the definition was amended (see page A2-Chart 1). A requirement to engage in firefighting is still necessary for admission to the FPS but, once admitted, should health problems cause you to be permanently disabled for firefighting yet still capable of performing other duties appropriate to your role as a firefighter, you will not be dismissed on health grounds. Consequently the question of incapacity for duty will have regard to all the duties you could be required to perform, not just firefighting.

   On 1 October 2004, the definition of "regular firefighter" was amended again but, on this occasion, it was simply to reflect changes in expressions required by the Fire and Rescue Services Act 2004, e.g. "brigade" was replaced by "fire and rescue authority", etc.

Rule A10 (continued)

Points To Note continued

5. It should be noted that the definition of regular firefighter mentioned in Point 4 above relies on continuity of appointment. If, therefore, the question of disability arises as part of a review of entitlement under Part K, the test of whether you are again "capable of performing the duties of a regular firefighter" would take your capability for firefighting into account once again.

6. Since 1 October 2004, the employment provisions of the Disability Discrimination Act have included firefighters – see the guidance produced jointly by the Disability Rights Commission and the Chief Fire Officers Association (FSC 16/2005 refers).

7. With effect from 1 April 2006, Rule A10 was amended to remove those parts that related to disablement and injury. This was because the Firefighters' Compensation Scheme ("FCS") came into effect on that date. The relevant provisions were moved from the FPS to the FCS.

Rule A10 explains the meaning of "disablement".

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The meaning of permanent disablement

According to Rule A10(1), you (or a child) are permanently disabled if, at the time the question of disability arises for decision, your disablement is considered likely to be permanent. This obviously depends upon the medical evidence available at the time (see "Medical questions" in the explanation of Rule H1 and "Points To Note", below.)

Rule A10(1A) says that when a fire and rescue authority have to determine whether a disablement is permanent they should have regard to whether it is likely to continue until the person's normal pension age. This is defined in Rule A13 as age 55 (see "Points To Note", Point 10 for the definition before 21 November 2005).

Date of disablement

Rule A10(4) states that if you retire before you become disabled and the date at which you became disabled cannot be established, the date of disablement will be taken to be the date on which you first made your claim of disablement known to the fire and rescue authority.

Degree of disablement

Rule A10(3) says that if it is necessary to determine your degree of disablement (this would be for purposes of an injury award) the degree of disablement is judged by the extent to which your **earning capacity** has been affected by your qualifying injury. The link with earnings is necessary because injury pensions are calculated on a system of "minimum income guarantee" designed to bring your total income in retirement up to a certain level.

You are treated as being totally disabled if, as a result of the injury, you are receiving in-patient treatment at a hospital.

Examples

Examples of assessment of degree of disablement are given on page A10-Example 1. An example of apportionment is given on pages A10-Example 2

Rule A10 (continued)

Useful reference source

- FSC 8/1998: explains assessment of degree of disablement in respect of retained firefighters
- FSC 3/2003: offered an interpretation of “permanently disabled” in advance of the introduction of Rule A10(1A)
- South Wales Police Authority v Morgan, High Court, Queen’s Bench Division, 8.10.2003: if there are separate injuries of which one is a “duty injury” and one is not, the degree of disablement is assessed only by reference to the effect of the former on the earning capacity
- Pensions Ombudsman Case M00841: confirms disregard of secondary employment when deciding to what extent earning capacity has been affected
- FSC 30/2004: definition of "permanent"
- Carlier v Surrey County Council, 23.9.2004: Rule A10(3) does allow for apportionment between loss of earnings attributed to a qualifying injury and those attributed to a non-qualifying injury
- FPSC 4/2005: explains replacement of compulsory retirement age with normal pension age

Points To Note

1. Your degree of disablement will depend on the extent to which your earning capacity has been affected by your qualifying injury. No account can be taken in the assessment of degree of disablement of any injury which is not a qualifying injury.

2. You should understand that the loss of earnings criteria for assessment of the guaranteed minimum income under the FPS is different from the criteria used by the DWP to judge entitlement to awards. The DWP base their assessment on the extent of physical or mental disablement as a percentage of “normal” functioning and not the extent of any change in earning capacity.

3. The independent qualified medical practitioner chosen by the fire and rescue authority to give an opinion for the purposes of the determination of award under Rule H1 will give guidance on the extent to which your earning capacity has been affected.

4. Medical and non-medical issues would be taken into account to assess the degree of disablement. By reference to your background, skills, qualifications etc., the kind of employment you could undertake in retirement, allowing for your particular health problem, would be considered. There would then be a direct comparison between your earnings when employed as a firefighter and your potential earnings in some other job. If you have found another job at the time of the assessment you should expect this factor to be taken into account, although it is not necessary for you to have found work for an assessment to be made of your earning capacity. Also, because the assessment is based on potential earnings, and the job you have taken may not reflect your full skills and qualifications, etc., it may not be your actual earnings in that job which are taken into account, but a higher figure. The medical issues must be considered by the independent qualified medical practitioner and put in his/her opinion. In addition, he/she may also have regard to the non-medical issues and assess the degree of disablement.

(continued over)

Rule A10 (continued)

Points To Note continued

4. *(continued)* Alternatively, your authority may assess your potential loss of earnings and the degree of disablement having regard to the independent qualified medical practitioner's opinion of the medical issues and taking into account the non-medical issues. Their assessment, however, would be agreed with, and countersigned by, the independent qualified medical practitioner.

5. Please remember that although you may be disabled from being a firefighter where fitness standards are exceptionally high, you may be fully capable of taking up other employment.

6. If your employment prospects are such that in an outside employment you could be expected to earn as much as, or more than, a firefighter, you must expect it to be concluded that your degree of disablement is virtually nothing, which would put you into the “slight disablement” category. At the other extreme, the Scheme rules make it clear that if you are receiving hospital in-patient treatment as a result of a qualifying injury you will be deemed to be totally (i.e. 100%) disabled.

7. The table in Schedule 2 Part V which is used for assessing the amount of an injury (see the explanation of Rule B4) is divided into four bands – slight, minor, major and severe. Where you are placed **within** each band does not affect your award. You can appeal if you consider you have been put in the wrong band.

8. After the assessment of degree of disablement has been made, there is provision for it to be reviewed by the fire and rescue authority from time to time (see explanation of Rule K2), but nothing would be done unless it was found that your degree of disablement had substantially altered. You would have a right of appeal (see explanation of Rules H2 and H3) against any such change, as you have for the original decision.

9. The use of earnings as a firefighter for the purpose of deciding degree of disablement was challenged in a case brought to the Pensions Ombudsman (Case M00841). A firefighter claimed that the fire authority should not only have taken account of his earnings as a firefighter, but also his earnings from his secondary employment, when deciding to what extent his earning capacity had been affected by the qualifying injury. The Ombudsman’s conclusion was that to have regard to earnings other than those of a firefighter would lead to an anomalous result. Consequently he confirmed that the job of a firefighter (or something with the need for like skills and physical and mental abilities) should be used as the reference point in determining whether and to what extent earnings capacity is affected.

10. Rule A10(1A) - the use of compulsory retirement age – as defined by Rule A13 – as a test of "permanence" - was added to the FPS with effect from 13 September 2004. At that time, Rule A13 defined compulsory retirement age as age 55 for all ranks up to and including Station Officer, age 60 for all ranks Assistant Divisional Officer and above. (If an extension of service had been allowed by the authority, compulsory retirement age would be the date/age of the firefighter at the end of that extension. On 21 November 2005, Rule A13 was amended to remove the reference to compulsory retirement age and replace it with "normal pension age". This is age 55 regardless of the rank/role of the firefighter.

(continued over)

Rule A10 (continued)

Points To Note continued

10. *(continued)* Although the majority of cases will be considered before normal pension age, occasionally a case of "after-appearing" injury (see Rule A11) may need to be considered after the firefighter has attained age 55 retirement age. The wording of Rule A10(1A) is not intended to exclude consideration of cases where the question of permanent disablement, as caused or substantially contributed to by a qualifying injury, does not arise until after retirement age.

11. If you are a part-time regular firefighter, the comparison between earnings as a firefighter and your potential earnings as a non-firefighter should be based on the whole-time equivalent earnings in both cases.

12. Before 13 September 2004 the definition of "regular firefighter" and therefore access to the FPS was based on the inclusion, in your terms of appointment, of a requirement to engage in firefighting. If you were subsequently found to be unfit for firefighting it was expected that you would be dismissed from the service even if, at that time, "firefighting" was a limited part of your duties and/or you remained perfectly fit to undertake all other duties of your rank/role. With effect from 13 September 2004 the definition was amended (see page A2-Chart 1). A requirement to engage in firefighting is still necessary for admission to the FPS but, once admitted, should health problems cause you to be permanently disabled for firefighting yet still capable of performing other duties appropriate to your role as a firefighter you will not be dismissed on health grounds if the authority are of the view that your retention would be of value to the service and they require you to continue to perform those other duties. Consequently the question of incapacity for duty will have regard to all the duties you could be required to perform, not just firefighting. It may be, however, that when the question arises, it is your firefighting skills that are of most importance to the service and that your ability to perform other duties has less relevance. In which case dismissal on health grounds would apply if you are permanently unfit for this aspect of your job - your fitness to perform the other duties would have no relevance if the authority cannot offer you the employment which would use them. On 1 October 2004, the definition of "regular firefighter" was amended again but, on this occasion, it was simply to reflect changes in expressions required by the Fire and Rescue Services Act 2004, e.g. "brigade" was replaced by "fire and rescue authority", etc.

13. It should be noted that the definition of regular firefighter mentioned in Point 12 above relies on continuity of appointment. If, therefore, the question of disability arises as part of a review of entitlement under Part K, the test of whether you are again "capable of performing the duties of a regular firefighter" would take your capability for firefighting into account once again.

14. Since 1 October 2004, the employment provisions of the Disability Discrimination Act have included firefighters – see the guidance produced jointly by the Disability Rights Commission and the Chief Fire Officers Association (FSC 16/2005 refers).

Examples of assessment of degree of disablement

The formula for assessment of degree of disablement for a regular firefighter is –

$$\text{degree of disablement} = \frac{(\text{earnings as a firefighter}) \text{ less } (\text{potential earnings as non-firefighter*})}{\text{earnings as a firefighter}} \times 100$$

*by reference to skills, qualifications, etc

Example A

If a regular firefighter's pay is £20,000 a year and she suffers a disablement which, by reference to her skills and qualifications, should still enable her to hold a job paying £15,000 a year, the degree of disablement would be assessed as –

$$\frac{\text{£20,000 less £15,000}}{\text{£20,000}} \times 100 = 25\% \text{ degree of disablement}$$

Example B

If a regular firefighter's pay is £30,000 a year and he suffers a disablement which, by reference to his skills and qualifications, should still enable him to hold a job paying £12,000 a year, the degree of disablement would be assessed as –

$$\frac{\text{£30,000 less £12,000}}{\text{£30,000}} \times 100 = 60\% \text{ degree of disablement}$$

Example C

A firefighter's pay is £18,000 a year and he suffers a disablement. However, his skills and qualifications are such that in spite of his medical condition he should still be able to hold a job paying £24,000 a year. Because £24,000 is higher than his earnings as a firefighter the degree of disablement will be 0%.

The formula for assessment of degree of disablement for a retained firefighter is –

$$\text{degree of disablement} = \frac{\text{earnings of a regular firefighter of equivalent rank} \text{ less } \text{potential level of earnings as non-firefighter*})}{\text{earnings of a firefighter of equivalent rank}} \times 100$$

*by reference to skills, qualifications, etc

Example D

A retained firefighter has become permanently disabled as a result of a qualifying injury and leaves the fire and rescue service. A regular firefighter of similar rank would have been in receipt of pay of £18,000 a year. Whilst a retained firefighter he also held a clerical post with the service on a salary of £13,000 a year. His disability is such that he will be able to continue in this post. He is, however, a qualified Development Control Officer, a post which would attract a salary of £16,500 a year. Medical opinion is that his disability would not prevent him from performing the duties of such a post. In this example, therefore, while the salary of £13,000 is a useful guide to the minimum potential earnings (because the former firefighter will actually receive this) for the assessment formula it is the figure of £16,500 which must be used because this is his earnings potential. Consequently, the assessment of his degree of disablement would be as follows –

$$\frac{\text{£18,000 less £16,500}}{\text{£18,000}} \times 100 = 8.33\% \text{ degree of disablement}$$

Example of apportionment

The following notes are based on guidance given by the Department at Annex A of FSC 9/2005, issued 8 March 2005

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 the Department – see the model medical certificates B, D and F given at Annexe 7 of this Commentary.

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 FRAs 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.

Example of apportionment

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.

Example of apportionment

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.

- 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 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" (i) 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 "Extract from ALAMA Presentation at Pension Seminar Lecture 1997" on next page).

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. However not all the aetiological factors which may be regarded as occupational in the context of the fire and rescue 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 this Commentary

Example of apportionment

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

(iii) 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.

Extract from ALAMA Presentation at Pension Seminar Lecture 1997

The approach given below 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 FRAs and has been accepted as a logical basis for assessment by the Boards of Medical Referees under Rule H2 of the FPS.

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 (%)