



## 2002-861

Representative: Gaëtan Paquette, BPA  
Decision No: 100000330861  
Decision Type: Entitlement Appeal - Retroactivity  
Location of Hearing: Charlottetown, Prince Edward Island  
Date of Decision: 28 February 2002

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As a result of an Entitlement Appeal hearing brought forward by the surviving spouse of the late Appellant, held 28 February 2002, this Board rules as follows:

### **RULING**

#### CERVICAL DISC DISEASE

The late member of the forces would have been entitled to a pension for this disability assessed at Class 19 or Schedule 1, 10%, effective 6 November 1997.

Dependents pensionable if otherwise eligible.

Section 35 and subsections 21(1), 48(3) and Paragraph 56(1)(a.1), *Pension Act*

Pay an additional amount equal to 24 months of pension.

Subsection 56(2), *Pension Act*

#### **Change in effective date only**

#### LUMBAR DISC DISEASE

The late member of the forces would have been entitled to a pension for this disability assessed at Class 18 or Schedule 1, 15%, effective 6 November 1997.

Dependents pensionable if otherwise eligible.

Section 35 and subsections 21(1), 48(3) and Paragraph 56(1)(a.1), *Pension Act*

Pay an additional amount equal to 24 months of pension.

Subsection 56(2), *Pension Act*

#### **Change in effective date only**

Original signed by:

\_\_\_\_\_ Presiding Member

J.R. Gallant

\_\_\_\_\_ Member

C.L. DePontbriand

Original signed by:

## ISSUES

An Entitlement Appeal hearing was held via videoconference between Charlottetown, Prince Edward Island, and Montreal, Quebec, as the Appellant, the surviving spouse of the late Appellant was dissatisfied with an Entitlement Review decision of 25 July 2001. Mr. Gaëtan Paquette, Bureau of Pensions Advocates, represented the Appellant.

## EVIDENCE

The Advocate submitted the following exhibits in support of this claim:

EA-Ex-O1: Excerpt from *Interpretation Manual of Laws*, 2nd edition, page 239

EA-Ex-O2: Excerpt from *Interpretation Manual of Laws*, 2nd edition, page 269, 626 and 627

### Cervical Disc Disease Lumbar Disc Disease

The issue in this case is one of additional retroactivity under subsection 56(2) of the *Pension Act* for the pensioned conditions of cervical disc disease and lumbar disc disease.

The Advocate argued that the Entitlement Review Panel in its decision dated 25 July 2001, erred when it denied additional retroactivity under subsection 56(2) of the Act. He submitted that subsection 56(2) does not restrict the award only to cases of administrative delays on the part of the Government or Veterans Affairs Canada. He argued that the Entitlement Review Panel's interpretation of subsection 56(2) of the *Pension Act* was too restrictive and that the effective date for the pensioned conditions should be 6 November 1995.

## REASONS AND CONCLUSION

In its research, the Board concludes that subsection 56(2) of the *Pension Act* contains essentially the same wording as subsection 39(2) of the *Pension Act*. With respect to the application of subsection 39(2), it is clear that the provision is discretionary in nature. It may be invoked where the facts of the case demonstrate the existence of the exceptional circumstances of the type which are enumerated in subsection 39(2) of the *Pension Act*.

These are:

1. Delays in securing service or other records.
2. Other administrative difficulties beyond the control of the applicant.

Subsection 39(2) of the *Pension Act* must be understood in conjunction with subsection 39(1) as it was intended to mitigate the general "3 year" rule established by subsection 39(1). Whereas subsection 39(1) would generally allow no more than 3 years of retroactivity, subsection 39(2) will permit an additional amount which would not exceed an additional two years of pension, if the case satisfies the specific criteria referred to in subsection 39(2) of the *Pension Act*.

The Interpretation Decision of the predecessor Board, the Veterans Appeal Board in Interpretation Decision "I-42" which interpreted subsection 39(2) of the *Pension Act* indicates that subsection 39(2) was intended to apply only to cases where there is a delay between the date of application for that particular pension and the awarding of the pension which is in excess of 3 years. In order to invoke subsection 39(2) there must be a delay created by an administrative type of delay.

Interpretation I-42 also indicated that the nature of the delay and its reasons must be substantiated by way of evidence. A mere assertion by an Applicant that there was a delay beyond his or her control is insufficient. There must be evidence showing that there was in fact a delay in securing records, or that there was a true administrative difficulty which was beyond the control of the Applicant. An administrative delay or difficulty would involve difficulty with administrative processes or operational problems. It would not include a delay caused by pursuing and awaiting the outcomes of adjudicative processes. A failure to succeed in obtaining a positive decision after pursuing one's case through the proper adjudicative processes is not properly characterized as an "administrative delay", as is confirmed in the Woods Committee Report of 1968.

The Board accepts that the interpretation given to the words of subsection 39(2) of the *Pension Act* is applicable to those same words as they appear in subsection 56(2) of the *Pension Act*. Applying this interpretation to the facts of this case, the Board notes that the facts of this case would seem to come within the meaning of subsection 56(2). First, the date of the delay between the application for this particular pension and the awarding of the pension was in excess of three years. The first clear evidence of an intent to submit an application for a survivor's pension is demonstrated by a letter from the Appellant to the Veterans Affairs Regional Office dated 27 November 1989. While there was an earlier contact made by the Appellant in 1984, this did not amount to an application for a pension, it was merely an enquiry which was not followed-up. However, there is clear evidence on file that the Appellant did proceed to request the documentation necessary to substantiate her application for a pension shortly after contacting the Department in 1989. Thus, the Board notes that the application for this pension was first made in late 1989, but the pension was not awarded until 1 June 2000.

Subsection 56(2) of the *Pension Act* also requires evidence of a specific type of delay. The delays identified must arise out of delay in securing "service or other records", or out of difficulties which were in the nature of "administrative difficulties". The facts of this case indicate that the delay experienced by the Appellant is the type of delay which comes within the meaning of delay in securing service records or other documents. The documents necessary to the Appellant's claim were medical records which were in the possession of third parties, outside of the Department of Veterans Affairs. The evidence on file shows that shortly after the Appellant contacted the Department of Veterans Affairs to apply for a pension, the Advocate contacted the Appellant's deceased husband's former employer seeking the records and medical documentation in their possession, as well as l'hôpital Neurologique de Montréal for records in its possession.

The documentation on file contains clear evidentiary substantiation of the fact that the Appellant experienced difficulties in obtaining this medical evidence from her husband's former employer, Bell Canada. This is clearly set out in a letter dated 11 July 1990 from Dr. G. Mathieu, indicating that Bell Canada would not release medical information without the signature of the "patient" himself. As well, there is documented evidence in the file from l'hôpital Neurologique de Montréal dated 18 January 1991 indicating that they were unable to locate the medical records of the Appellant's deceased husband.

Subsection 56(2) of the *Pension Act* also requires evidence that the delays or administrative difficulties were beyond the control of the Appellant. It is clear that the Appellant and her Advocate had identified the documents which they required and that they had taken all reasonable steps which could be taken to obtain the documents. The delays arose from the failure on the part of two bureaucracies, one in the private sector, and the other on the part of the health care system, to respond in a timely, logical, and appropriate fashion to the Appellant's legitimate request for her husband's medical documents. This was not a delay caused by failure of the Appellant or her Advocate to seek the evidence in a timely manner, nor did it arise out of the normal delays created as the case wound its way through the adjudicative processes provided for under Veterans Affairs legislation. These factors indicate that the delay in this case was caused by a true administrative difficulty beyond the control of the Appellant.

Given that there is clear and substantiated evidence of delays in securing service and other records, and that the difficulties encountered by the Appellant were in the nature of "administrative difficulties" and that these difficulties were clearly also beyond her control (as well as beyond the control of her Advocate), the Panel finds that the facts of the Appellant's case satisfy the words of subsection 56(2) of the *Pension Act*.

The Board will therefore award an additional 24 months retroactivity for the pensioned conditions of cervical disc disease and lumbar disc disease under subsection 56(2) of the *Pension Act*.

In its review of the file, the Board noted that the Minister, in a decision dated 6 November 2000, awarded pension entitlement for cervical disc disease and lumbar disc disease effective 1 June 2000, date of

application. The Entitlement Review decision dated 25 July 2001, awarded three years of retroactivity for the two conditions based on a first application in the 1980's, under paragraph 56(1)(a.1) of the *Pension Act*, effective 6 November 1997, three years prior to the date of the Minister's decision.

This Board now awards an additional 24 months of retroactivity based on evidence of delays in securing records beyond the control of the Appellant under subsection 56(2) of the *Pension Act*.

In arriving at this decision, this Board has carefully reviewed all the evidence, medical records and the submissions presented by the Representative, and has complied fully with the statutory obligation to resolve any doubt in the weighing of evidence in favour of the Applicant or Appellant as contained in sections 3 and 39 of the *Veterans Review and Appeal Board Act*.

## RELEVANT LEGISLATION

Paragraph 21(1)(a) of the *Pension Act* states that in respect of military service rendered during World War I or World War II where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that was attributable to or was incurred during such military service, a pension shall, on application, be awarded to or in respect of the member.

Paragraph 56(1)(a.1) of the *Pension Act* states that pensions awarded with respect to the death of a member of the forces shall be payable with effect as follows:

(a.1) to or in respect of the member's survivor or child, or to the member's parent or any person in place of a parent who was wholly or to a substantial extent maintained by the member at the time of the member's death, if paragraph (a.2) does not apply, and if no additional pension referred to in paragraph 21(1)(a) or (2)(a) was at the time of death being paid in respect of that person or that person is awarded a pension under section 48, from the later of

- i. the day on which application for pension was first made, and
- ii. a day three years prior to the day on which the pension was awarded with respect to the death of the member.

Subsection 29(1) of the *Veterans Review and Appeal Board Act* states that an appeal panel may

- (a) affirm, vary or reverse the decision being appealed;
- (b) refer any matter back to the person or review panel that made the decision being appealed for reconsideration, re-hearing or further investigation; or
- (c) refer any matter not dealt with in the decision back to that person or review panel for a decision.

Subsection 39(1) of the *Pension Act* states that a pension awarded for disability shall be made payable from the later of

- (a) The day on which application therefor was first made, and
- (b) a day three years prior to the day on which the pension was awarded to the pensioner.

Subsection 39(2) of the *Pension Act* states that notwithstanding subsection (1), where a pension is awarded for a disability and the Minister or, in the case of a review or appeal under the *Veterans Review and Appeal Board Act*, the Veterans Review and Appeal Board is of opinion that the pension should be awarded from a day earlier than the day prescribed by subsection (1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension.

Subsection 48(3) of the *Pension Act* states that on application by a dependant of a deceased member of the forces who died without having applied for a pension and whose death was not attributable to military

service, the Minister shall, in the same manner as if the application had been made by that member, determine whether that member would have been entitled to a pension had that member applied therefor at any time prior to his death.

Subsection 56(2) of the *Pension Act* states that notwithstanding subsections (1) and (1.1), where a pension is awarded with respect to the death of a member of the forces, or an increase to that pension is awarded, and the Minister or, in the case of a review or an appeal under the *Veterans Review and Appeal Board Act*, the Veterans Review and Appeal Board is of the opinion that the pension or the increase, as the case may be, should be awarded from a day earlier than the day prescribed by subsection (1) or (1.1) by reason of delays in securing service or other records or other administrative difficulties beyond the control of the applicant, the Minister or Veterans Review and Appeal Board may make an additional award to the pensioner in an amount not exceeding an amount equal to two years pension or two years increase in pension.

Section 25 of the *Veterans Review and Appeal Board Act* states that an applicant who is dissatisfied with a decision made under section 21 or 23 may appeal the decision to the Board.

Section 26 of the *Veterans Review and Appeal Board Act* states that the Board has full and exclusive jurisdiction to hear, determine and deal with all appeals that may be made to the Board under section 25 or under the *War Veterans Allowance Act* or any other Act of Parliament, and all matters related to those appeals.

Section 3 of the *Veterans Review and Appeal Board Act* states that the provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and the Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

Section 39 of the *Veterans Review and Appeal Board Act* states that in all proceedings under this act, the Board shall draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant; accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

## **DECISION BEING APPEALED**

### **CERVICAL DISC DISEASE**

The late member of the forces would have been entitled to a pension for this disability assessed at Class 19 or Schedule 1, 10%, effective 6 November 1997 (three years prior to date of Minister's decision).

Dependents pensionable if otherwise eligible.

Section 35 and subsections 21(1), 48(3) and Paragraph 56(1)(a.1), *Pension Act*

Section 21, *Veterans Review and Appeal Board Act*

### **Change in effective date only**

Paragraph 56(1)(a.1), *Pension Act*

After its careful consideration of this case, the Board has found no evidence upon which to base an additional award.

Subsection 56(2), *Pension Act*

VRAB Entitlement Review, 25 July 2001

### **LUMBAR DISC DISEASE**

The late member of the forces would have been entitled to a pension for this disability assessed at Class 18 or Schedule 1, 15%, effective 6 November 1997 (three years prior to date of Minister's decision).

Dependents pensionable if otherwise eligible.

Section 35 and subsections 21(1), 48(3) and Paragraph 56(1)(a.1), *Pension Act*

Section 21, *Veterans Review and Appeal Board Act*

**Change in effective date only**

Paragraph 56(1)(a.1), *Pension Act*

After its careful consideration of this case, the Board has found no evidence upon which to base an additional award.

Subsection 56(2), *Pension Act*

VRAB Entitlement Review, 25 July 2001

**FORMER RELEVANT DECISION**

CERVICAL DISC DISEASE

LUMBAR DISC DISEASE

Pensionable under subsections 49(3) and 21(1) of the *Pension Act*, Active Force service.

Minister's decision, 6 November 2000

The surviving spouse of the late Appellant first applied for pension entitlement for these conditions more than three years ago.

Date Modified: 2012-02-10