2002-992

Representative: Aidan Sheridan, BPA
Decision No: 100000313992
Decision Type: Assessment Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 6 March 2002

As a result of the Appellant's Assessment Appeal hearing held 6 March 2002, this Board rules as follows:

RULING

FRACTURED RIGHT ANKLE (OPERATED)
RETROACTIVITY

No change in effective date of increase in assessment to 25%.
Section 35, *Pension Act*.

Original signed by:
_____Presiding Member
J.A. Boisvert

Original signed by:
_____Member
L.J. MacInnis

Original signed by:
_____Member
P.L. Murphy

ISSUES

An Assessment Appeal hearing was held in Charlottetown, Prince Edward Island, on 6 March 2002 as the Appellant was dissatisfied with the assessment of his pensioned condition of fractured right ankle (operated). Mr. Aidan Sheridan, Bureau of Pensions Advocates, was the representative.

EVIDENCE

The Advocate introduced the following attachments:

AA-Attach-C1:	Table to Article 18.01 from the Veterans Affairs Canada Table of Disabilities; and
AA-Attach-C2:	five pages of Departmental correspondence sent to the Appellant.

Fractured Right Ankle (Operated) - Retroactivity

FACTS AND ARGUMENT

This appeal concerns the date on which payment of the Appellant's increase in disability assessment for his pensioned right ankle condition should have become effective. This date will be referred to as the "effective date" in this decision.

The facts of the case are that the Appellant underwent an arthrodesis on his right ankle on 7 May 1987, as indicated in a surgical report of that date. The operation resulted in a fusion of the ankle in a sub-optimum position. The Appellant received treatment allowances from the Department in relation to the period of time around the surgery during which he was in need of acute, intensive treatment, as indicated in a letter in AA-Attach-C2, concerning payment of the treatment allowances from Veterans Affairs Canada dated 10 August 1987. Among other things, the letter also stated that "the medical information has been referred to the Canadian Pension Commission for review." After the surgery, the Appellant did not request a reassessment of his pensioned disability, nor was he contacted by Veterans Affairs Canada or the Canadian Pension Commission (CPC) after his 1987 surgery. As a result, the Appellant did not have a reassessment of his disability level after his 1987 surgery.

The Appellant's first reassessment after the 1987 surgery, occurred in 1999 after he made a request to the Department for a reassessment of his pensioned condition of fractured right ankle (operated). The facts show that once the Appellant had contacted the Department on 17 May 1999, to request reassessment, a reassessment was performed shortly thereafter in July of 1999. The reassessment process involved a Pension Medical Examination (PME) by a Senior District Medical Officer (SDMO) of the Appellant's ankle disability, along with an assessment of the findings, under the Veterans Affairs Canada Table of Disabilities. The SDMO who performed the PME recommended the base 20% assessment prescribed for bony fusion under the Table of Disabilities, section 13 of Table 18.01, with an additional 5% for the sub-optimum position, for a total assessment of 25%. The SDMO also commented that, in his opinion, the assessment increase should be dated back to 1987 as the condition which merited the 25% had been present since the date of surgery.

After the reassessment process was concluded, the Appellant's assessment for his right ankle was then increased from 10% to 25%, as indicated in a decision of the Minister dated 11 August 1999. The Minister determined the effective date of the increase to be 26 July 1999. The Appellant was satisfied with the amount of his reassessment, but was dissatisfied with the Minister's decision on the effective date of the increase. He applied for a review of the decision before this Board. In the Review Panel's decision of 23 December 1999, the Panel determined that the Minister had not properly considered the issue of effective date and referred the issue of the effective date back to the Minister for a further reconsideration.

The subsequent Ministerial Reconsideration decision of 12 June 2000, varied the earlier decision, and found that the Appellant was entitled to have his increase back-dated to 17 May 1999, but confirmed that the increase would not be made retroactive to the date of the ankle operation in 1987. In declining to award retroactivity back to 1987, the adjudicator stated that the level of disability may have changed since the operation, and it was not possible to now determine what the Appellant's disability would have been as of 1987.

The Appellant was dissatisfied with this decision of the Minister dated 12 June 2000, and applied for a review by the Board. He argued that his effective date should have been based upon the date that his medical evidence established a deterioration in his condition, which was the date of surgery 7 May 1987, rather than the date of complaint. The Review Panel decision of 2 November 2000, affirmed the Minister's decision, finding that the date of complaint,17 May 1999, was an appropriate effective date, as it was based upon a reasonable application of the Department's policies in this area.

The Appellant then appealed the Review Panel's decision to this Appeal Board.

On Appeal, the Advocate argued that while the Appellant was satisfied with the amount of his disability assessment, he should have had his 15% assessment increase made payable to the date in 1987 when he had undergone surgery on his right ankle. The Advocate argued, on behalf of the Appellant, that the Appellant is entitled to receive his pension increase payable to a date which was 12 years prior to the date of the Appellant's complaint and application for disability reassessment. It was argued that the increase in assessment should be made effective to the date of the surgery in 1987, regardless of the fact that the Appellant did not seek to have his disability assessment varied at that time. The Advocate stated that

Veterans Affairs was under a legal duty to initiate the reassessment of the Appellant's ankle condition. The Advocate submitted that:

> ... The knowledge on the part of the Department that the appellant underwent a fusion procedure, in May 1987, should have automatically triggered a reassessment process, as it is clear that the surgery was for a fusion procedure which would, automatically, lead to an increase in assessment.

The Advocate also argued that Veterans Affairs Canada and the Canadian Pension Commission assumed legal responsibility in this case, for scheduling the Appellant's reassessment, because it had made certain statements in letters to the Appellant which had led the Appellant to believe that the Canadian Pension Commission would be initiating his ankle reassessment for him. The Advocate submitted that the only reason the Appellant was not reassessed in a timely fashion was because Veterans Affairs had failed to initiate the reassessment process for the Appellant, and if it were not for this failure, the Appellant would have been reassessed at 25% in 1987. It was, therefore, argued that the Appellant should have his current increase in assessment made payable back to May 1987, as if he had actually been reassessed as of the date.

REASONS AND CONCLUSION

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*.

This appeal concerns the question of the proper date on which the Appellant's increase in assessment for his pensioned disability right ankle condition should have become effective. The Appellant is seeking payment of the increase in his pension award, retroactive to 7 May 1987, rather than 17 May 1999. The date of 7 May 1987 is significant because it was the date that the surgical procedure was performed on the Appellant's right ankle. The date on which the Appellant sought or applied for the increase in his assessment was 17 May 1999.

The first issue which must be determined by this Board is whether the medical evidence before the Board reasonably supports the conclusion that the Appellant's disability was assessable at 25% as of the date of his surgery in 1987? If the answer to this question is "yes", then the Board must go on to consider the second and fundamental question.

The second issue is whether the Appellant's assessment increase should be made retroactive to the date in 1987, when it appeared from the medical evidence that the extent of his ankle disability had increased as a result of surgery, under the "Bony Fusion" section of Chapter 18, Table 18.01, section 13 of the Veterans Affairs Canada Table of Disabilities.

In resolving this issue, the Board will consider the Advocate's argument that the onus for making the application to initiate a reassessment had shifted from the Appellant to Veterans Affairs Canada, based upon the circumstances of the case.

ANALYSIS OF ISSUES

Issue No. One Whether the facts and evidence on the Appellant's file support the inference that the Appellant's condition was assessable at 25% in 1987

A review of the Minister's reasons in the Reconsideration decision of 12 June 2000, indicates that the documentation concerning the arthrodesis on the right ankle on 7 May 1987 was not considered sufficient to support the conclusion that there had been a worsening of the ankle condition to the extent that the disability would have been assessed at 25% as of May 1987. The Minister's decision of 12 June 2000 states in part:

> Surgery to the ankle in 1987, would not necessarily be associated with an increase in your level of disability. Such surgery may improve the level of function by reducing pain and increasing stability of an ankle joint.

Accordingly, the Appellant's effective date was determined by the Department, based on the date of application for reassessment in 1999.

In arguing this appeal, the Advocate did not directly challenge the reasoning of the adjudicator on the medical evidence. Nevertheless, it is clear that the Advocate's argument is based upon the premise that the medical evidence in the Appellant's file supports the conclusion that the ankle disability could have been assessed at 25% in 1987.

The Board has carefully reviewed the medical evidence on file in relation to the preliminary issue of whether the medical evidence on file may be capable of raising the inference that had the Appellant's disability been assessed in 1987, his assessment would have been fixed at 25%.

The Minister's decision seems to be based mainly on the notion that the level of disability as it existed in 1987 could not be assessed retrospectively in 1999. While the Board would have to agree in principle that it is generally not sound practice to attempt to retroactively assess what a disability level would have been at some point of time in the past, this case is rather unique. A consideration of the factual evidence and provisions of the Veterans Affairs Canada Table of Disabilities does not lead this Board to agree with the conclusions of the Minister on the analysis of the medical evidence and its implications in this particular case.

First, there is no question that the Appellant underwent a surgical operation on 7 May 1987 which resulted in a fusion of his ankle in a sub-optimum position. This fact is objectively documented in an Operative Procedure Report dated 7 May 1987, which establishes that the Appellant's ankle was fused, as of the date of the surgery, but in a sub-optimum position. The Board finds that the surgical report is reliable and objective. It was prepared at the same time as the surgery for the purpose of documenting the surgical procedure. It is not medico-legal in nature, in that it was not prepared for the purpose of supporting the Appellant's claim. The factual and objective nature of this report indicates that it is reliable evidence as to the medical condition of the Appellant's ankle in 1987.

Another relevant factor which leads this Board to reach a different conclusion from that of the Minister is that the provisions of the Veterans Affairs Canada Table of Disabilities are unusually specific, concrete and clear. Chapter 18, Table to Article 18.01, Section 13, indicates quite specifically that a "bony fusion" of an ankle in an optimum position merits a 20% assessment. There is also the opinion of the Senior District Medical Officer (SDMO) in 1999, which was to the effect that the "sub-optimum" position was a complicating factor in the overall disability level which warranted that 5% be added to the assessment to take into account the position of the fusion. The total assessment was determined to be 25%. The SDMO also indicated that the disability had been at this level since 1987.

Considering the factual evidence in conjunction with the SDMO's opinion as to quantum of amount of the assessment, which was clearly accepted by the Department, along with the provisions of the Table of Disabilities in Chapter 18, Table to Article 18.01, Section 13, it would be difficult to reach a conclusion other than that the evidence here is sufficient evidence to reasonably raise the inference, under section 39 of the *Veterans Review and Appeal Board Act* that the level of the Appellant's disability as of or after the date of his surgery, would in all likelihood, have been in the vicinity of 25%.

However, in the opinion of the Board, this determination does not completely resolve the issue of the proper effective date for the 15% increase in disability assessment. There is another issue in this case which must be resolved in order to determine whether it is appropriate to award the Appellant's disability assessment increase to a date which was 12 years prior to his request for a change in his assessment. This leads into a consideration of "Issue No. 2" which is, whether the Appellant's assessment increase should be made retroactive to the date in 1987?

Issue No. 2 Whether the Appellant's assessment increase should be made retroactive to the date in 1987 when the extent of his ankle disability had increased as a result of surgery

The Appellant is seeking that the 1999 reassessment, which increased his disability assessment to 25%, be made effective to 1987 as if he had actually applied for the increase in 1987. It is important to understand that the Appellant is not seeking that his assessment increase be made retroactive to a date before the decision to grant the increase was rendered. Rather, the Appellant is seeking an increase in his award, retroactive to the date on which he sought or applied for the increase.

It is the customary practice of the Veterans Affairs Canada system to give retroactive effect to its decisions when implementing payment of an award or an increase in award. The usual understanding of the term retroactivity by the Department is that the payment of an award is made retroactive to the date of the decision, but not prior to the date of the application. Accordingly, there is no question that the Appellant is entitled to retroactive payment of his increased award - and he was, in fact, granted a retroactive payment with respect to the period of time which had elapsed between the date of his first request for a reassessment in May of 1999, and the date of the Minister's decision to increase his assessment on 11 August 1999.

In this case, however, the Advocate argues that the Appellant's condition *would have been assessable* at 25% had it been reassessed in 1987, so he should now receive his assessment increase as if he had actually applied for it after his surgery in 1987. This raises an issue which can be properly resolved only through a full review of the applicable legislation and policies, in light of the facts of this case.

The facts of this case show that there was a very lengthy lapse of time between the date on which medical evidence indicated a change in the Appellant's medical condition, and the date on which the Appellant contacted the Department of Veterans Affairs (the "Department") requesting a reassessment of his disability level. Departmental policy on effective dates for assessment increases indicates that retroactivity may be awarded where medical evidence indicates that a condition deteriorated prior to the date of request. Although there is no formal policy statement on this issue, it is not Departmental practice to make an assessment effective to a date which significantly precedes the date of application.

The Board has reviewed the *Pension Act* in its entirety in order to determine the intent of the legislation with respect to effective dates for increases in awards which occur through the reassessment process. There is no specific provision in the *Pension Act* which indicates when payment of an assessment should commence. While section 35 of the *Pension Act* applies to assessment issues, it does not provide any real guidance on the question of whether increases or changes in assessment can be made retroactive to the date on which a reassessment was performed by the Department. Section 35 merely states that [the amount of] disability pensions are to be determined in accordance with the assessment of the extent of the disability. It says the assessment of the extent of a disability is to be based upon instructions in the Table of Disabilities. Subsection 37(2) of the *Pension Act* indicates that pensions will be adjusted in accordance with the extent of disability. The provision does not indicate when such an adjustment would take place.

On the other hand, it is also clear from a review of the legislation that there is no provision in the legislation which states that awards or increases in awards may or must be made retroactive to a date in time before the award was actually sought. The Department of Veterans Affairs Pension Policy Manual only confirms that the effective date for any disability assessment increase is a discretionary determination. Article 35 of the Policy Manual allows for assessment increases to be made effective to a date which is prior to the date of application or "complaint" in certain circumstances. However, the policy provides no guidance or limits around how far back the Department could go in granting retroactivity based upon the date of the medical evidence which was submitted to support the "complaint."

As there is no provision in the *Pension Act* which expressly directs that a change in an assessment is to be made effective to any specific date, it is clear that the *Pension Act* leaves a significant degree of discretion over assessments with decision-makers. In order to exercise this discretion in a proper manner, the intent, objectives and the scheme of the *Pension Act*, should all be considered.

As the Board will explain in this decision, although the *Pension Act* is silent on the issue of effective dates for assessment increases or decreases, and the Policy does not give specific guidance to the Board in exercising its discretion in this area, the Board does not interpret this as evidence that the legislation is impliedly dictating that retroactivity must be granted in every case. In looking at the intent of the *Pension Act* with respect to effective dates generally, it should be noted that the legislation does provide that entitlement awards be paid retroactive to the actual date on which the decision to award the pension was made. However, the legislation does not go so far as to suggest or provide that any award can be made retroactive to a date upon which the application was first made. In fact, the legislation contains a general prohibition against such a practice in relation to entitlement decisions, in section 39 of the *Pension Act*. In addition subsection 39(1) even limits the maximum period of retroactivity to three years, and subsection 39(2) provides for a period of five years in certain exceptional circumstances, regardless of the application date.

Section 39 of the *Pension Act* has historically been interpreted to apply only to determinations for effective dates in entitlement decisions, rather than to effective dates for assessments. This means that, while it

applies to the initial decision to award a pension, it does not apply to effective dates for increases or decreases in amounts of the award which may result from a reassessment.

While section 39 of the *Pension Act* does not apply directly to the determination of an effective date for an assessment increase or decrease, it is interesting to note that in any event, although it does provide that awards may be paid retroactive to the date of application, it does not allow for an effective date which precedes the actual date of application. The section also provides no greater right to "retroactivity" than a person would encounter under the general principles of common law. Although section 39 of the *Pension Act* is commonly referred to as a retroactivity provision, it could also be described as a limit on retroactivity. It does not allow for an award to be made payable to a date prior to the application, and even provides that pension awards may not be made effective to the date of application, where more than 3 years has passed since the application was made. Clearly, there is a specific concern within the legislation around retroactivity, and the significance of the application date.

Given that there is no provision in the *Pension Act* which explicitly determines the issue of effective dates for assessments, it is useful to gain some perspective on the issue of retroactivity, generally, by referring to common law principles on the issue of retroactivity. Under the common law there is no right to "retroactivity." Generally, it is the date upon which an individual first applied for a benefit which is recognized in law as the proper commencement date or "effective date" of an award. In any case, where an individual is seeking a benefit or award, either from a government agency or from an individual (under private or civil law), entitlement to payment of the award would commence on the date the award was applied for, or the date on which the evidence necessary to establish the case was finally received. The general principle is that there is no right to receive retroactive payments unless it is provided for in a statute. Where no statutory right exists, then the presumption would be that there is no claim to have an award paid retroactively.

The Board notes, as well, that the Appellant's argument that he should receive his assessment increase retroactive to 1987, even though he did not make application for the increase until 1999, implies that the actual application or request for reassessment is not a significant factor in the determination of an effective date. This raises questions about the underlying role of the application in the reassessment process.

In his submissions, the Advocate dealt with this issue by pointing out that there is no explicit provision in the legislation requiring that a pensioner apply for reassessment. However, after carefully reviewing the legislation on this point, the Board would have to conclude that the right to apply for a reassessment is a significant component of the reassessment process under the *Pension Act* and that the date of application is a key factor to be taken into account in the determination of an effective date for any increase in assessment.

This conclusion arises out of a review of the evolution of the *Pension Act* over the past 31 years. In 1971, legislative changes took place which changed the nature of the disability assessment process. Prior to these legislative amendments, the pensioner did not have any right to make application for a reassessment of his/her pensioned condition, nor any right to appeal an assessment. Prior to the amendments, reassessments were entirely within the discretion of the Canadian Pension Commission (CPC). The CPC was wholly responsible for initiating all assessments. The pensioner could not apply for a reassessment. However, the 1971 legislative amendments introduced a new right in the pensioner to make application for assessment increases, and to appeal a disability assessment. The amendments and their effect was discussed in the interpretation decision of the Pension Review Board (PRB) known as "I-17" (27 April 1976). The Board refers to page 3 of the PRB's reasons in I-17:

> Prior to March 30, 1971, the definition of an applicant in the *Pension Act* included provisions for an automatic application under certain conditions. This definition placed the onus on the Commission to initiate consideration of a claim without an application, and a disability at the time of release from the service was a condition precedent for such action on the part of the Canadian Pension Commission. However, this onus on the Commission to initiate claims was removed from the Act in 1971. An "applicant" was defined to mean "a person who has applied for an award or for an increase in an award" and "application" was defined to mean "an application for an award" and "award" was in turn defined to mean "a pension, allowance, bonus or grant payable under the Act."
>
> It is not without significance that the procedural section of the Act was also materially amended.

> Prior to the 1971 amendments, there were two different procedures, one for World War I or peacetime service claims, and one for World War II claims. There were no provisions in the Act for application procedures in regard to discretionary benefits such as compassionate pension, attendance allowance, etc., **and furthermore, there was no specific procedure under which a pensioner could apply for an increase in assessment** or an increase in the degree of aggravation, and no provision for subsequent review or appeal. The procedural section, then sections 58 to 68, only governed applications for entitlement under section 12 (then section 13). Section 58 (now section 59) was amended to include **applications for an award and matters of quantum as well as entitlement**. This opened all respective avenues of redress to all persons who had applied for an award. Thus the amendments ensured the right of appeal to all applicants...
>
> Sight must not be lost of the fact that proceedings under the Pension Act are by way of inquiry and not by trial. Once the person who applies for an award, **or for an increase in an award**, claims a disability, and the period of service to which he relates it, the matter becomes one of examination and adjudication.

The Board notes that while the 1971 amendments to the *Pension Act* have themselves been amended to reflect the current separation of administrative and decision-making powers between the Department of Veterans Affairs and the Veterans Review and Appeal Board, the overall scheme of the *Pension Act* has not changed since 1971. Under the current *Pension Act*, the term “applicant” is still defined in subsection 3(1) to mean “a person who has applied for an award or for an increase in an award.” Under the legislative scheme which was established at that time, and still continues to exist under the *Pension Act*, it is important to note that the individual possesses a right to seek a reassessment of the medical condition for which they were pensioned. The individual also enjoys a right of appeal where they are dissatisfied with a disability assessment, which previously did not exist under the pre-1971 system.

In short, the amendments to the *Pension Act* changed the status of assessment matters. Whereas in the past, disability assessments and their increases or decreases, were solely within the discretion of the Department, and there was no mechanism to allow the pensioner to make an application for a reassessment, that has not been the situation since 1971. The amendments to the *Pension Act* referred to in “ I-17", opened the door to reassessments on application from the pensioner. Given the right to make application for reassessment was considered to be sufficiently important to be codified in legislation, this Board would conclude that the application for reassessment itself, was, and remains a significant procedural step in enforcing one’s right to a reassessment under the *Pension Act*.

The conclusion that the application for reassessment is part of the reassessment procedure is supported by a consideration of the way in which reassessments are administered by the Department under the *Pension Act*. In order to obtain a reassessment, the pensioner need only indicate to the Department that she or he is dissatisfied with their current level of assessment. In accordance with section 3 of the *Pension Act*, the scheme for reassessments established under the *Pension Act* is generous in the sense that it allows for reassessments on request, without placing any restrictions on the ability of a pensioner to seek an increase in assessment. It is nevertheless also obvious from a reading of the *Pension Act* that as part of this scheme, there are rights and corresponding responsibilities which pensioners must fulfill in order to benefit from the scheme. It is also clear that in order for the system to function effectively, it is incumbent on the pensioner to request a reassessment whenever they feel their condition may have worsened.

In matters of reassessments - after the Department has performed the initial assessment necessary to determine the amount of the award - responsibility for requesting subsequent reassessments is generally the responsibility of the pensioner. There are exceptions to this principle. For example, there are “mandatory reassessments” where the Department may establish a schedule of periodic reassessments of a pensioner’s disability in cases where a disability level has not stabilized. In such a case, the Department initiates the pensioner’s reassessments at regular intervals. As well, under subsection 35(3) of the *Pension Act*, reassessments of disability from tuberculosis must be performed in accordance with the statute. However, for the majority of cases, a reassessment would be initiated by pensioners themselves, by contacting the Department to make a complaint about the amount of their present assessment or by applying for a reassessment to the Department.

It should also be noted that a review of the legislation shows that there is no provision in the *Pension Act* which places legal responsibility or an onus for initiating reassessment of disability upon the Department. The Board notes that while it is true that there is no provision in the legislation expressly stating that a pensioner

must apply for an assessment increase in order to be reassessed, the necessity of making an application for a reassessment is implied within the definition of "Applicant" in the *Pension Act*. *In subsection 3(1),* "Applicant" *is defined to include a person who has applied for "an increase in an award.*" As noted by the PRB in "I-17", (discussed above) an increase in an award is obtained through reassessment, and therefore, the reference in the definition of "applicant" to a person "...who has applied for ...an increase in an award" would by implication, include a person making application for an increased assessment.

The fact that the legislation was amended to establish a system whereby pension awards could be increased on application by pensioners through applying for reassessment of their pensioned conditions would indicate that the application process is significant. In order to enforce or "act" upon the right, the pensioner must take the necessary procedural step of contacting the Department to make application for a reassessment. The pensioner applies for a reassessment by making "a complaint" to the Department. The complaint is in effect, the application for reassessment. It is, therefore, important to note that under the legislative scheme for reassessment, it is NOT the mere fact that a medical condition has changed which triggers the reassessment, or the assessment increase. **It is the complaint to a Departmental representative which then triggers the legal right under the *Pension Act* to have a reassessment.**

Article 35, Paragraph 2(b), of the Department of Veterans Affairs Pension Policy Manual, which deals with fixing effective dates for reassessments where a condition has deteriorated must be read in light of this statutory scheme. It provides that the effective date for reassessment may be the *earlier of*: i) the date of complaint or, ii) the date on which the medical information submitted indicates a change in the assessment. Clause 2(b)(ii) of the Departmental Policy allows the Department to fix an effective date back to a date which is prior to the date of application or "complaint". The Policy is very vague in that it provides no guidance or limits on how far back the Department could go in granting retroactivity based upon the date of the medical evidence, or the type of case it is intended to apply to.

The Board has considered the Policy in light of its observations on the scheme of the legislation around reassessment issues. The Board notes that the Policy appears to be geared toward the typical set of facts in which a reassessment request arises, such as where a pensioner makes a request for reassessment shortly after they believe their condition has worsened, and submits medical evidence which indicates that the condition had worsened just prior to the date of complaint. As the request for reassessment was made in a timely fashion and was made within the same period of time in which the medical condition had changed, there would be little difference between the date of the application for reassessment and date of the medical evidence. It would be entirely reasonable in this type of a case to rely on the Departmental policy to fix the "effective date" for the increase to pre-date the actual complaint, because there would be no significant discrepancy between the date of the application and the date of the change in the medical condition. The application and the medical evidence would relate to the same time period and there would be an obvious degree of continuity between the date of medical evidence and the date of application.

However, this type of situation is different from a case where an Applicant seeks to rely on medical evidence which refers to a distinctly different period of time from the date on which the application for reassessment was made. In the opinion of the Board, the Department's Policy in Article 35, clause 2(b)(ii) does not deal with the latter fact situation. This may be the case because the Policy was only designed to deal with unremarkable cases where there would be no significant discrepancy between the date of the application and the date of the change in the medical condition. However, the facts of this particular case fall within another category. Here, there was a twelve year lapse between the date on which the medical information indicated a change in the condition and the actual date of complaint or application for reassessment. The Appellant is seeking to rely only on his medical evidence in establishing his effective date.

If the Board were to apply Article 35 clause 2(b)(ii) to mean that it must always determine an effective date, based solely on the date on which medical information indicated a change in the assessment, the Board would be putting "blinders on" or fettering its own discretion to determine each case in a fair and reasonable manner, in accordance with the intent of the legislation. While the Board notes that section 2 of the *Pension Act* and section 3 of the *Veterans Review and Appeal Board Act* require that a liberal and generous construction be placed on the words of the legislation in deciding each case, the Board does not find that this provision gives this Board, or any other decision-maker, a licence to circumvent the scheme or intent of the legislation.

All policy must be interpreted reasonably and consistently within the parameters of the legislation. In light of the statutory scheme of the *Pension Act* in which it is the pensioner's complaint which triggers the

pensioner's legal right to have a reassessment, the Board finds it is not reasonable to apply the Department's policies so as to ignore the date of complaint - application - in determining an effective date. In a case where there is a significant discrepancy between the application date and the date the medical evidence indicated a deterioration in the medical condition, awarding retroactivity based solely on the date of medical evidence would effectively circumvent the scheme established under the *Pension Act*.

Considerations of fairness in terms of consistency and equitable treatment amongst pensioners who come before the Board is also a valid consideration to be taken into account in applying polices in this area. In terms of consistency, a policy of making retroactive adjustments to pensions where an assessment has changed, based solely on the medical evidence, would not uniformly favour the interests of pensioners or result in generous treatment in all cases for a number of reasons.

First, the policies or laws which apply to effective dates for assessment increases, would also apply to assessment decreases. The practical implication of this is that while a pensioner may be very pleased to learn that an assessment increase and the corresponding pension increase has been given retroactive effect, the same would not be true if an assessment decrease, and the decrease in pension that goes with it, were given retroactive effect. Such a practice would certainly not be viewed as equitable or generous.

In terms of fair and consistent treatment amongst pensioners, an individual who diligently pursues their reassessment in a timely fashion deserves to benefit from acting on their rights in a conscientious manner. However, to adopt a blanket policy of retroactively implementing an assessment increase as of the date on which the assessment could have been increased, *had it been requested*, regardless of circumstances, would not be equitable as it would work to the detriment of those pensioners who sought a reassessment in a reasonably timely fashion. Such a policy would reward certain pensioners by providing additional benefits by deeming entitlement to an increased pension to be established as of a date which pre-dated actual application. On the other hand, the pensioner who had diligently acted on his or her rights in a reasonably timely fashion and took steps to enforce their legal rights by following the application process in a timely fashion would not be rewarded with any additional benefit.

Fairness also means giving consideration to the integrity and protection of the overall system of benefits, the administration of which has been entrusted to the Department of Veterans Affairs and over which the Veterans Review and Appeal Board performs its appellate function. The Board has a responsibility to determine appeals in keeping with the legislation and in a way which furthers the integrity of the system. As a policy consideration, it is undeniably in the best interests of pensioners to encourage them to pursue their legal rights in a timely fashion, so as to protect the integrity of the system. Any policy which serves to encourage lengthy periods of time to elapse before a pensioner acts on their rights under the *Pension Act* is undesirable, as it is obviously not in the pensioner's own interest. Encouraging pensioners to "sit on their rights", from an institutional perspective, is also not a good policy as it leads to difficulties in pension administration which affect the ability of the Department to account for and deliver its programs effectively.

A policy of routinely implementing retroactive payments in assessment cases appears contrary to policy considerations underlying the Pension Act. As noted by Mr. Justice Noel J. in the Federal Court decision of *Leclerc and Canada (Attorney General)* [1998] F.C.J. NO. 153, there is a concern reflected in the *Pension Act* with enabling Parliament to determine and budget for its fiscal obligations to pensioners which are owed under the Pension Act. Section 39 of the *Pension Act* is an example of this concern. As noted by Noel J. in *Leclerc*, the reason section 39 of the *Pension Act* exists, is in order to ensure that the Department of Veterans Affairs does not have unanticipated costs for which it cannot budget. As Mr. Justice Noel J. stated in paragraph 19 of the *Leclerc* decision, the legislative scheme established for the benefit of pensioners ensures that pensions may always be reviewed and increased over time in recognition of the fact that disabling conditions may change over time.

However, the effect of the scheme from the standpoint of the "payor" (the government), is that when pensions are always subject to increase, the financial burden associated with this pension scheme is never ascertained with any finality. Thus Parliament deemed it advisable to limit the retroactive effect of pension payment obligations under the *Pension Act*. Reassessments of disabilities which have changed over time would obviously have the same impact on the Government's ability to ascertain the increasing fiscal obligations it may owe under the *Pension Act*. The issues and principles explained by Mr. Justice Noel in the *Leclerc* decision would logically apply to reassessments, and demonstrate why it is important for the Board to exercise its discretion responsibly, reasonably and fairly, in making any decision which affects retroactivity of increased pension payments.

As a result, in exercising its discretion in this area, the Board has balanced the legal and policy considerations which have been discussed in this decision, along with other relevant factors in this case. The Board concludes that it is reasonable to refer primarily to the date of complaint, or application for reassessment, as a reference point for establishing the effective date of an assessment increase or decrease, unless there are some exceptional or compelling circumstances which suggest that to do so would be unfair. This conclusion is supported by comments and findings contained in the Report of the Woods Committee which studied various issues in the disability pension legislation. The issue of retroactivity for assessment increases was discussed at page 978 of the page report where the Committee stated that the general practice was not to award increases in assessment retroactively. **However, the Committee recommended that assessment increases should be made effective as of the date of application for the increase, provided that the medical evidence actually indicated that the assessable degree of disability existed from the date of application.**

Applying this reasoning to the Appellant's case, the Board notes that the Appellant was not reassessed at a higher level in 1987 because he did not complain to the Department or apply for reassessment. While the medical basis for the increase may have existed in 1987, that is only part of the overall equation which is taken into account in determining an effective date. The application date is relevant as well, given that the legal right to an increase did not exist until the complaint concerning the (then) current disability assessment triggered a reassessment. The facts of the case show that this did not occur until May 1999, and this date is, in the Board's opinion, a relevant factor to be taken into account in setting the effective date for payment of the assessment increase.

However, there was an additional issue raised in this appeal. The Advocate submitted that there were unusual circumstances in this case, in that there was some undertaking by the Department or CPC which suggested to the Appellant that he was not responsible for seeking a reassessment of his ankle condition. The Advocate also submitted the following:

> The knowledge on the part of the Department that the appellant underwent a fusion procedure, in May 1987, should have automatically triggered a reassessment process, as it is clear that the surgery was for a fusion procedure which would, automatically, lead to an increase in assessment.

In response to this argument, it is necessary to point-out that an assessment of disability is a matter directly related to payment of a disability pension, which is a separate and distinct form of compensation from a treatment allowance. Disability pensions are awarded under the authority of section 21 of the *Pension Act* for permanent disability. A treatment allowance is paid under the authority of the *Veterans Health Care Regulations* and does not come within the meaning of an "award" payable under subsection 3(1) of the *Pension Act*. A treatment allowance is discretionary and temporary, intended to benefit those pensioners who are undergoing acute, intensive treatment. Such an allowance is not directly related or dependant on an assessment, in that an individual who has received a treatment allowance would not automatically be entitled to an assessment, or vice versa.

As noted already, under the *Act* it is the duty of the Appellant, not the Department, to initiate or apply for a reassessment where they believe their condition may have deteriorated. There is no legal duty on the Department under any provision of the *Pension Act* to identify or seek-out persons who could be reassessed because their condition may have changed.

However, once the pensioner has complained or requested reassessment, there is a duty on the part of Veterans Affairs Canada to undertake an assessment of the level of disability. Therefore, while it is true to say that it *is the duty* of the Department to perform reassessments on a pensioner, the duty arises only after the Department has been contacted and received a complaint. For these reasons, the Board finds that the mere fact that the Department granted a treatment allowance in respect of the Appellant's treatment on 7 May 1987 does not create a legal responsibility on Veterans Affairs Canada to reassess the ankle, or shift the usual onus for requesting a reassessment from the Appellant to the Department.

There is also no authority to support the argument that a request for one form of compensation, such as a treatment allowance, may represent a constructive application for additional or distinct form of benefit or award. An application for one type of benefit, such as a treatment allowance, does not automatically initiate an application or request for a completely different type of payment. The general principle in this regard is set out in section 80 of the *Pension Act* which states that "... no award is payable unless **an application has been made by or on behalf of the person**, and payment of the award has been approved under this Act."

This principle was most recently affirmed in the decision of Mr. Justice Yvon Pinard of the Federal Court in *Sangster v. the Attorney General of Canada* in which the court rejected the argument that an initial application which was made in relation to another type of award could be considered “an application” for all additional or subsequent benefits which a pensioner later wished to pursue under the *Pension Act*. Based upon this, the Board cannot conclude that the mere fact that there was payment of a treatment allowance in respect of the surgery gives rise to an obligation on the part of Veterans Affairs to initiate the Appellant’s reassessment process.

The Advocate also argued that certain statements in letters to the Appellant in 1984 and 1985, concerning the issue of assessment of the Appellant’s ankle disability, as well as a letter from a Senior Regional Medical Officer with Veterans Affairs dated 10 August 1987, had the effect of leading the Appellant to believe that Veterans Affairs would be initiating his ankle reassessment for him. The correspondence dated 10 August 1987 from the Senior Regional Medical Officer was in relation to the treatment allowance. It indicated that medical information was forwarded to the CPC for review and the Appellant would be contacted if pension action was indicated. The term “pension action” is not clear to this Board as it was not explained in the letter.

The Board notes that the letters from the CPC to the Appellant in 1985 and 1984 stated that the CPC would be pleased to review the Appellant’s case if his medical report showed his pensionable disability had worsened. The Appellant was invited to contact his legal representative or CPC Head Office if he had questions about his disability pension. The documents in question, considered together, do not establish before this Board that the Appellant was advised that Veterans Affairs would initiate a reassessment should his condition change in the future. These documents demonstrate that the Appellant was advised of his right to seek a review of his case before the CPC if his medical condition worsened in the future. He was informed that it was his responsibility to request a reassessment. The Appellant was also provided with a contact number if he wished to ask questions concerning his disability pension. Legal representation was available to the Appellant if he wished to clarify his entitlement or seek a reassessment of his pensioned condition.

It should also be noted that a full twelve years elapsed between the date of the surgery and the actual contact with the Department to seek reassessment in 1999. There is nothing in the facts of this case to suggest that the Appellant was prevented from contacting the Department to clarify the meaning of any of these documents. The information in the documents does not reasonably raise the inference that the Appellant was advised that he could not seek a reassessment of his pensioned condition by contacting the CPC. The evidence also fails to account for the twelve year time period which passed between the date of surgery in 1987 and the Appellant’s contact with the Department in 1999 to seek a reassessment when the first complaint concerning reassessment was recorded.

In conclusion, the evidence relating to the circumstances surrounding the Appellant’s complaint and reassessment does not suggest that there are grounds for finding that legal responsibility for initiating the reassessment should be deemed to have shifted to Veterans Affairs on the basis of some implied undertaking.

As a reasonable proposition, it would also appear that in a case such as this where there is no evidence to indicate a reassessment was sought until the official date of complaint recorded by the Department, this evidence would logically be interpreted as an indication that the pensioner was satisfied with his or her disability assessment until the particular point in time the complaint was made. It also appears presumptuous to retrospectively assume that the Appellant was, in fact, dissatisfied with this assessment in 1987, and wished to have a reassessment at that point in time, given that there is simply no evidence before this Board to show that he had applied for reassessment at that time.

The Board also notes that the issue in this case is not “fault” for failing to seek a reassessment as there is simply no obligation on a pensioner to seek a reassessment until such time as s/he may wish to have one. It is a question of legal responsibility for making a request to the Department for reassessment once a pensioner is dissatisfied with his current assessment. In this case, it appears that once an Appellant determined that he would exercise his right to seek an increased pension by requesting a reassessment, he successfully initiated his reassessment. In order to find that the Appellant’s assessment increase could be made effective as of the date of the medical evidence in 1987, the Board would have to prefer the date of the medical evidence over the date of complaint, and ignore the fact that the Appellant enforced his right to reassessment in 1999 rather than 1987. The facts and circumstances of this case do not demonstrate that relying on the application date to establish the proper effective date of the Appellant’s pension increase which resulted from his reassessment in August of 1999, would be unfair.

The Board notes as well that the circumstances of the case show that once the Appellant requested a review of his disability assessment, he received his reassessment and assessment increase from the Department promptly, and the Appellant received a retroactive payment of his pension increase in relation to the period of time which elapsed between the date of his first contact with the Department (17 May 1999) to request a reassessment, and the actual Departmental decision to increase his disability assessment on 11 August 1999.

In light of the foregoing, this Board, therefore, concludes that it was fair and reasonable to fix the date of payment of the Appellant's increased pension as of 17 May 1999, based on the date of his application for a reassessment.

CONCLUSION

The Appeal Board declines to award further retroactivity beyond that which was already awarded by the Minister in the Reconsideration decision dated 12 June 2000, and subsequently affirmed by the Board in a review decision dated 2 November 2000. The Appeal Board affirms the decision to pay the increase in the Appellant's pension which resulted from his 1999 assessment increase, effective17 May 1999.

The Board has determined that it is not reasonable to award the pension increase which resulted from the Appellant's reassessment of 11 August 1999, as this would be retroactive to the date on which the Appellant actually requested or applied for a reassessment of his pensioned condition.

The Board notes that the statutory provisions, which deal with assessments under the *Pension Act*, provide for a large degree of discretion in making decisions on assessment matters. Nevertheless, it is clear that the discretion granted under the legislation must be exercised reasonably, respecting the objectives, intent and scheme of the *Pension Act*. Under the scheme for reassessment of pensioned conditions established by the *Pension Act*, it is not the changing nature of the medical condition *per se* which triggers a change in a disability assessment, but the complaint which triggers a pensioner's legal right to have a reassessment. The Board, therefore, does not accept that it is appropriate to determine an effective date for implementation of a revised disability assessment based solely on the date of the medical evidence. In determining an effective date for an increased pension resulting from an adjustment in disability assessment, consideration should be given to both the date on which a reassessment was requested by the pensioner and the medical evidence.

The Board concludes that in a case such as this, where there is a significant discrepancy between the application date and the date on which medical evidence indicated a deterioration in the medical condition, it would not be reasonable to award a pension increase retroactive to a date which significantly predates the actual request for reassessment. This would effectively circumvent the scheme for applications in reassessment matters established under the *Pension Act*. Relying on the date of complaint for establishing the effective date of an assessment increase, is reasonable unless there is evidence of some exceptional or compelling circumstances which suggest that to do so would be unfair.

The Board concludes that in a case such as this, where there is a significant discrepancy between the application date and the date on which medical evidence indicated a deterioration in the medical condition, it would not be reasonable to award a pension increase retroactive to a date which significantly predates the actual request for reassessment. This would effectively circumvent the scheme for applications in reassessment matters established under the Pension Act. Relying on the date of complaint for establishing the effective date of an assessment increase, is reasonable unless there is evidence of some exceptional or compelling circumstances which suggest that to do so would be unfair.

This Appeal Board, therefore, affirms the decisions of the Assessment Review Panel and the Minister to establish the date of payment of the Appellant's increased pension as of 17 May 1999, based on the date of the Appellant's application for a reassessment.

RELEVANT LEGISLATION

Sections 35(1) and (2) of the Pension Act state that the amount of pensions for disabilities shall be determined in accordance with the assessment of the extent of the disability resulting from injury or disease or the aggravation thereof, as the case may be, of the applicant or pensioner. The assessment of the extent of a disability shall be based on the instructions and a table of disabilities to be made by the Minister for the guidance of physicians and surgeons making medical examinations for pension purposes.

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.

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.

FORMER PENSION STATUS

FRACTURED RIGHT ANKLE (OPERATED)

Full entitlement assessed at 25%

This information is taken from a Summary of Assessment dated 17 August 1999.

Date Modified: 2012-01-10