



## 2003-935

Representative: Shannon Hill, BPA  
Decision No: 100000524935  
Decision Type: Entitlement Review  
Location of Hearing: Nanaimo, British Columbia  
Date of Decision: March 12, 2003

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As a result of the late Applicant's Entitlement Review hearing held 12 March 2003, this Board rules as follows:

### RULING

ATTENDANCE ALLOWANCE

#### **THE BOARD AFFIRMS THE MINISTER'S DECISION.**

No attendance allowance is indicated at this time.  
Subsection 38(1), *Pension Act*.

Original signed by:

\_\_\_\_\_ Presiding Member  
W.D.F. Wilson

Original signed by:

\_\_\_\_\_ Member  
Felipe Pascual

### ISSUES

The late Veteran's spouse appeared before an Entitlement Review Board in Nanaimo, British Columbia, on 12 March 2003 as she was dissatisfied with a Departmental Review decision of 28 June 2002. This decision rescinded an earlier decision of the Department dated 22 March 2002 which awarded attendance allowance for her late spouse, under subsections 48(2) and 38(1) of the *Pension Act*. The late applicant passed away on 8 February 2002.

Also in attendance at the hearing was the late Veteran's daughter, who was born in 1942. Both the late Veteran's spouse and her daughter were sworn in before the hearing. The late Veteran was represented at the hearing by Ms. Shannon Hill of the Bureau of Pensions Advocates.

### EVIDENCE

The Advocate submitted the following exhibits as evidence:

- ER-A1: client notes from Veterans Affairs Canada's computer system;
- ER-A2: a CSDN printout from Veterans Affairs Canada's computer system;
- ER-A3: nine pages of extracts from the late Veteran's file; and
- ER-A4: a letter dated 12 March 2003 by the late Veteran's spouse.

## Attendance allowance

### FACTS AND ARGUMENT

At the outset of the hearing, the Advocate advised the Board that this case is a lifetime claim being pursued by the late Veteran's surviving spouse.

The Advocate drew the attention of the Board to the Minister's decision dated 22 March 2002 which reads, in part:

....Based on your late spouse's needs, Attendance Allowance has been awarded at Grade 1, currently paid at \$\*\*\*\* per month, effective 2000/02/18. In accordance with subsection 38(3), this allowance will continue to be paid to you at Grade 1 for a period of one year, effective 2002/03/01, i.e. first day of month following the month your spouse's death....

The Advocate also referred the Board to a subsequent Departmental Review decision dated 28 June 2002 rescinding the earlier decision of 22 March 2002.

The Advocate then reviewed in detail the information contained in ER-A1, ER-A2, ER-A3 and ER-A4.

The Advocate called the attention of the Board to notes recorded in the Veterans Affairs Canada's computer system (ER-A1), created on 4 December 2001, which states:

VETERAN DISCHARGE FROM HOSPITAL TO HOME ....HOME VISIT DONE SEPT 20/01...VET IN HOSPITAL AND TO BE RELEASED IN THE NEXT WEEK HOPEFULLY. O/T REQUEST FOR EASY LIFT CHAIR...VIP IN PLACE...HSKPG GSKPG SOCIAL & ADDED RESPITE. NO FURTHER ACTION AT THIS TIME.

On page 2 of the same exhibit, the Advocate referred to the following:

Date Created: 2001-10-23 8:22...

BIA - Spouse called to update vet had a fall Saturday night and broke his hip. Client was transported to Nanaimo Hospital and he underwent surgery yesterday. Client will not be as mobile as he was and will need an ot assessment as was previously requested 5oct2001. Spouse anticipates needing additional help when he first comes home. HI priority WI sent this date. (As transcribed)

The Advocate called the attention of the Board to ER-A3, in particular, to the Application for Disability Pension dated 9 October 2001 as well as the Department's date-stamp thereon of 23 October 2001. She also made reference to page 8 of the same exhibit which noted an Audiogram Report dated 19 January 2002 and the Department's date-stamp thereon of 29 January 2002.

As well, the Advocate referred the Board to a screen printout from the Veterans Affairs Canada computer system in ER-A2 which notes:

....First Application - 2002-02-19....  
....Forwarded to Head Office - 2002-02-07  
Adjudication - 2002-02-18  
Payment/Distribution - 2002-02-19

During the course of the hearing, the late Veteran's spouse submitted to the Board a letter dated 12 March 2003 (ER-A4). In the said letter, the late Veteran's spouse states, among others things, the following:

....I am aware that my late husband died 10 days before the application for attendance allowance was approved by Veterans Affairs on February 18, 2002. However, I wish to draw to the attention of the panel the fact that his application for a loss-of-hearing pension was made in October of 2001 and an appointment for a hearing test was set for October 20, 2001. Unfortunately, during this time he was in the Nanaimo hospital undergoing hip surgery due to a fall. After being hospitalized for six weeks, my late husband could not leave his home. I then exhausted all avenues without success to

have a hearing test done at home. Finally, Veterans Affairs arranged for a mobile hearing test on January 19, 2002....

In conclusion, the Advocate argued that, on the basis of the evidence presented, the Departmental Review decision dated 28 June 2002 be set aside, and that the attendance allowance awarded in an earlier decision of 22 March 2002 in the amount of \$\*\*\*\*\* per month, effective 18 February 2002, be reinstated.

## 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*.

The Board has thoroughly reviewed all of the available evidence, including the information contained in ER-A1, ER-A2, ER-A3 and ER-A4. In addition, the Board reviewed in detail the Minister's decision dated 22 March 2002 and the Departmental Review decision dated 28 June 2002, with the earlier decision awarding an attendance allowance to the late Veteran, while the latter one rescinded the award.

Section 82(1) of the *Pension Act* provides:

Subject to subsection (2), the Minister may, on the Minister's own motion, review a decision made by the Minister or the Commission and may either confirm the decision or amend or rescind the decision if the Minister determines that there was an error with respect to any finding of fact or the interpretation of any law, or may do so on application if new evidence is presented to the Minister.

There is no doubt that the law, above-quoted, authorizes the Minister or the Veterans Affairs Canada to review a decision, and may either confirm, amend or rescind the decision if the Minister or the Department determines that there was an error with respect to any finding of fact or the interpretation of any law, or may do so on application if new evidence is presented to the Minister or to the Department.

In rescinding the Minister's decision dated 22 March 2002, the Departmental Review decision dated 28 June 2002 stated:

...The Department had no authority to rule as the client was not in receipt of Disability Pension at the time of death, therefore, we regret the decision of 2002/03/22 effective date 2002/02/18 is rescinded....

The issue placed before the Panel was whether or not the late Veteran was in receipt of a disability pension at the time of his death on 8 February 2002. Unfortunately, while the Panel is able to render a positive ruling on that question, it finds that the wrong issue is being addressed.

The Pension Policy Manual of the Department of Veterans Affairs, under Article 38(1)(e) reads:

Subsection 48(3) of the *Pension Act* does not permit the dependants of a pensioner who has died without having applied for Attendance Allowance, to apply for such allowance.

There is no question in this case that the application for Attendance Allowance, made on form#PEN 6203 provides a "date of contact" of 18 February 2002. That earliest possible date which can be used as the date of application for Attendance Allowance was ten days after the death of the Veteran.

The Departmental Review Decision of 28 June 2002, therefore, was correct in rescinding the decision of 22 March 2002, albeit for the wrong reason. While the Panel finds the late Veteran would properly be considered as having been in receipt of a disability pension at the time of his death, it also finds that an Attendance Allowance application could not be accepted after the Veteran's date of death and therefore cannot be reinstated.

## **NOTE:**

Section 25 of the *Veterans Review and Appeal Board Act* provides that an Applicant who is dissatisfied with the decision of a hearing may, by notice in writing, appeal the decision to the Veterans Review and Appeal Board. Representation is available, free of charge, from the Bureau of Pensions Advocates or from the service bureau of a veterans' organization or from any other representative of the Applicant's choice, at the Applicant's expense.

If the Applicant should require further information in regard to the foregoing, it will be available from the nearest district office of the Department of Veterans Affairs or from the representative who assisted with the present application.

## **RELEVANT LEGISLATION**

Section 21 of the *Veterans Review and Appeal Board Act* states that a review panel may

- (a) affirm, vary or reverse the decision of the Minister being reviewed;
- (b) refer any matter back to the Minister for reconsideration; or
- (c) refer any matter not dealt with in the decision back to the Minister for a decision.

Subsection 38(1) of the *Pension Act* states that a member of the forces who has been awarded a pension or compensation or both, is totally disabled, whether by reason of military service or not, and is in need of attendance shall, on application, in addition to the pension or compensation, or pension and compensation, be awarded an attendance allowance at a rate determined by the Minister in accordance with the minimum and maximum rates set out in Schedule III.

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.

Section 18 of the *Veterans Review and Appeal Board Act* states that the Board has full and exclusive jurisdiction to hear, determine and deal with all applications for review that may be made to the Board under the *Pension Act*, and all matters related to those applications.

Section 84 of the *Pension Act* states that where an Applicant who is dissatisfied with a decision made by the Minister under this Act or subsection 34(5) of the *Veterans Review and Appeal Board Act* may apply to the Veterans Review and Appeal Board to review this decision.

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**

### **ATTENDANCE ALLOWANCE**

The Department had no authority to rule as the client was not in receipt of Disability Pension at the time of death, therefore, we regret the decision of 2002/03/22 effective date 2002/02/18 is rescinded.

Departmental Review decision, 28 June 2002

The late Veteran's spouse first applied for pension entitlement for attendance allowance, on her late spouse's behalf, on 18 February 2002.

Date Modified: 2012-02-07