



## 2010-711

Representative: Eric Marinacci, BPA  
Decision No: 100001493711  
Decision Type: Entitlement Review  
Location of Hearing: Toronto, Ontario  
Date of Decision: 5 March 2010

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### The Entitlement Review Panel decides:

#### **ADDITIONAL PENSION - INCAPACITATED CHILD**

Pursuant to Section 21 of the *Veterans Review and Appeal Board Act*, this case is referred back to the Minister for reconsideration and a decision.

Section 21, *Veterans Review and Appeal Board Act*

**Before:** Ellen Riley Presiding Member  
John Morrison Member

Original signed by:

Signed by:

\_\_\_\_\_  
John Morrison

### INTRODUCTION

The Veteran is 87 years of age and served in the Active Force from 13 January 1943 to 14 November 1945, including service overseas from 13 January 1944 to 12 April 1944. He has requested a review of the decision of Veterans Affairs Canada (VAC) dated 16 March 2009 to deny additional pension entitlement on behalf of his disabled son pursuant to paragraph 34(1)(a) of the *Pension Act*.

### ISSUES

The first issue to be determined is with respect to the jurisdiction of VAC to render the decision that is before the Panel at this time for review.

As part of the Panel's review following the conclusion of the hearing, approximately 30 pages of additional material relating to an earlier application made by the Veteran in 1997 for an additional pension under paragraph 34(1)(a) of the *Pension Act* for his adult child were found in the Departmental Head Office file. The 1997 application had been denied by VAC in a Minister's decision dated 5 February 1998 on the basis that the disability of the adult son had not been established. When the Department rendered its decision on 16 March 2009, which is the only decision before the Panel, VAC does not appear to have been aware of the earlier application and decision in 1997, and accordingly, of the jurisdictional issue created by it.

The jurisdictional issue that is raised by the evidence on file and which must be determined is whether VAC, having already rendered a first level decision on 5 February 1998 determining the issue of the Veteran's eligibility for an additional pension under paragraph 34(1)(a) in respect of his adult child, had jurisdiction to issue another first level decision on the same issue and facts.

The issue to be determined in the event that the Department did in fact have jurisdiction to issue the decision under review is whether the Veteran has provided sufficient credible or trustworthy evidence on which to establish that his adult son meets the criteria set out in section 34 of the *Pension Act* and therefore is eligible for a pension as an incapacitated child.

The relevant sections of section 34 of the *Pension Act* state:

**34.** (1) No pension shall be paid to or in respect of a child after the last day of the month in which the child attained the age of eighteen years except

(a) where the child is unable to provide for the child's own maintenance owing to physical or mental infirmity that occurred before the child attained the age of twenty-one years, in which case a pension may be paid while the child is incapacitated from earning a livelihood by the infirmity

(3) The Minister may award a pension to or in respect of any child entitled to be maintained by the member of the forces in respect of whom pension is claimed.

## **EVIDENCE AND ARGUMENT**

The Veteran testified at the hearing. The Advocate provided additional documentation on his behalf, including a report dated 3 March 2010 (ER-K1) from Dr. Paul Goldhamer, a psychiatrist who has been involved since 1985 in the treatment of the Veteran's son.

The facts with respect to the claim before the Panel on review arose from an application made by the elderly Veteran to VAC on 25 February 2009 for an additional pension under section 34 of the *Pension Act*, for, or in respect of, his adult child who was living at home and who suffers from schizophrenia. The Veteran's application of 25 February 2009 stated that the son's condition had been first diagnosed at age 28. His application also stated that his son had been extremely paranoid and schizophrenic all of his adult life, and that he had resisted treatment for his problems. The Minister's decision of 16 March 2009 denied the additional pension claim on the basis that the condition manifested after the age of 21 years.

As previously mentioned, after the hearing the Panel discovered additional relevant information and evidenced in the Departmental Head Office file consisting of some 30 additional pages of material relating to an earlier application by the Veteran in 1997 on the same issue under paragraph 34(1)(a) of the *Pension Act* for his adult child.

In brief, the evidence from 1997 indicated that the adult child had been employed at some unidentified times in the past as a runner at a law firm, and with a postal trucking firm. The 1997 documentation states that he was unable to continue working due to stress. The 1997 documentation also indicates that the adult child was in receipt of social assistance from the Provincial Government although it is not clear as to whether this was welfare or disability related. From this income he paid his father \$125.00 for rent each month and provided for his own food and clothing. The adult child had a driver's licence and drove his father to appointments.

## **ANALYSIS/REASONS**

In weighing the evidence in this matter, the Panel has been fully cognizant of the provisions of section 5 of the *Pension Act*, and section 39 of the *Veterans Review and Appeal Board Act*, which require that claimants benefit from every reasonable inference, that the case be established through credible evidence, and that claimants be provided with the benefit of the doubt as to whether they have established a case. The Panel also is aware that this does not relieve the Veteran of the burden of proving on a balance of probabilities the facts required to establish entitlement to a pension: *Wannamaker v. Canada (Attorney General)* (2007), 361 N.R. 266 (F.C.A.)<sup>1</sup>.

The Panel determines that VAC did not have jurisdiction to render a first level decision in this matter on 16 March 2009. The Department had already issued a first level decision on 5 February 1998 determining the issue of this Veteran's eligibility to an additional pension under section 34 of the *Pension Act* with respect to his adult child. The decision of 16 March 2009 is therefore null and void.

Once VAC issued a decision with respect to the adult son's eligibility to an additional pension under section 34 of the *Pension Act*, the Department would be *functus* or without jurisdiction to reopen the issues that had

been previously determined in the 1998 decision unless it invoked its statutory decision review authority under section 82 of the *Pension Act* and performed a Departmental Review of the 1998 decision. In other words, the Department could review and reconsider its earlier decision, but could not issue another first level decision on the same issues and facts.

The Panel notes that while the evidence from the 1998 decision is some 12 to 13 years old, it is nevertheless relevant to the issues raised by the 2009 application and decision and in some respects constitutes a much more complete collection of evidence than that which was before the Panel in the hearing held on 5 March 2010. Fairness dictates that the Veteran have a full opportunity to address this evidence.

In summary, the decision under review is a nullity. The most equitable solution in these circumstances is to refer this matter back to VAC under paragraph 21(b) of the *Veterans Review and Appeal Board Act* for a reconsideration and a review of the issues the Department had determined in the earlier decision from 1997. This will also give the Veteran a further opportunity to provide more complete evidence that will enable a fairer and fuller hearing of this matter.

Accordingly, the Panel will not be rendering a decision with respect to the substantive issue of the Veteran's eligibility for an additional pension under paragraph 34(1)(a) in respect of his adult child. The Panel, however, does have comments to make that may be helpful to the Veteran with respect to what the Panel believes is required to make the case for an additional pension for an adult child, on the basis of the child's infirmity, under section 34 of the *Pension Act*.

There are four statutory requirements which must be satisfied in order to establish entitlement to an additional pension for or in respect of a child who is over the age of 18 (i.e., an adult child) on the basis of the child's infirmity, under section 34 of the *Pension Act*. The first three basic criteria are set out in paragraph 34(1)(a) and relate to the adult child's infirmity and its effects on the adult child's ability to maintain himself, or herself. The fourth is set out in subsection 34(3) of the *Pension Act*, and states that no additional pension can be paid under subsection 34(1) unless the adult child is entitled to be maintained by the member or veteran of the Canadian Forces in respect of whom the pension is claimed.

The four criteria may be summarized as follows:

- 1) the child is unable to provide for the child's own maintenance. . . ;
- 2) because of an infirmity that occurred before the age of 21 years;
- 3) and the infirmity incapacitates the child from earning a livelihood;
- 4) finally, the child must be legally entitled to be maintained by his or her veteran parent.

The first criterion in paragraph 34(1)(a) refers to the child's ability to maintain life and health through the provision of the basic necessities of life. An adult child therefore is unable to provide for his or her own maintenance within the meaning of paragraph 34(1)(a) where the child is unable to provide the basic necessities of life. An applicant therefore should provide evidence of a significant level of physical or mental impairment or disability on the part of the adult child with respect to whom an additional pension is claimed because only an adult with a significant level of impairment from their infirmity would be unable to independently provide for his or her own necessities of life.

With respect to the infirmity, the Panel would normally look for credible medical evidence that speaks to the actual degree of physical or psychiatric impairment that is due to the adult child's infirmity. Where the infirmity is psychiatric in nature, as in the present case, information should be provided on the adult child's current symptoms, as well as an assessment of the child's level of psychiatric impairment and psychosocial functioning, to allow the Panel to make an informed decision on the ability of the adult child to provide for his or her own maintenance.

The second criterion in paragraph 34(1)(a) is with respect to the age of onset of the infirmity. The provision requires that the application must set out facts, established on the balance of probabilities, that support the conclusion that the medical condition or infirmity had its onset before the child's 21st birthday. The Board has rejected in previous decisions the notion that evidence of an inactive or latent infirmity prior to age 21 is sufficient.

The statutory use of the word "infirmity" as opposed to medical condition or some other form may suggest that the infirmity be manifest, patent or visible, and active, rather than latent, before the age of 21 years. In

other words, the Panel would expect some evidence that the symptoms and effects of the infirmity manifested and became active in the adult child, before the child reached the age of 21.

An outline or chronology of the adult child's activities and circumstances in teenage years and twenties, as well as a credible medical opinion as to the age of onset of the disease based on the specific facts of the case, for example, attendance at educational institutions, employment history, where the adult child has resided, would be most useful in reaching an informed decision.

The third criterion in paragraph 34(1)(a) is with respect to the adult child's ability to earn a livelihood. Is the adult child incapacitated from earning a livelihood by virtue of his or her infirmity? Information with respect to employment history, receipt of social assistance etc, would be useful as well as information relevant to criterion one as referred to above.

The fourth criterion as set out in subsection 34(3) raises the question as to whether the adult child is entitled to be maintained by the veteran/parent. Subsection 34(3) states that an additional pension may only be paid if the child is entitled to be maintained by the veteran or member of the Canadian Forces in respect of whom a pension is claimed. In other words, does the adult child have a legal entitlement to be maintained? Again, this criterion may be linked to criterion one.

The requirement that the child be entitled to be maintained by their parent in subsection 34(3) is not explicitly defined anywhere in the Act. In order to determine whether this requirement is met in any given case, it is necessary to consider the larger legal framework within which the *Pension Act* operates. The question becomes under what legal circumstances will the law impose or recognize parental obligations to support an adult child. Once a child reaches the age of majority or adulthood, which is age 18 years, a parent has a legal responsibility to maintain an adult child under two circumstances, both of which are codified in section 2 of the *Divorce Act*. A parent may be ordered to pay child support for, or to a child who is over 18 years, if the adult child continues to be under the parent's charge and is unable, by reason of illness or other cause, to withdraw from their charge or to obtain the necessities of life.

It is not unreasonable to conclude that the additional provisions of the *Pension Act* were made in contemplation of and designed to work within the larger legal framework of common law and statutory legal obligations for child support. In other words, paragraph 34(1)(a) and subsection 34(3) of the *Pension Act* were intended to incorporate the same principles and factors concerning a child's legal entitlement to maintenance into the determination of whether an additional pension can be paid for or in respect of an adult child on the basis of their infirmity under section 34 of the *Pension Act*.

Each case will turn on its own unique set of facts, but the main question to be answered under both paragraph 34(1)(a) and subsection 34(3) is whether the adult child is dependant on their veteran or member of the Canadian Forces parent because the child's infirmity is of such significance that the child is unable to provide for their necessities of life and remains within the charge of the parent.

## **DECISION**

The Panel rules that the decision of Veterans Affairs Canada of 16 March 2009 is null and void for lack of jurisdiction.

The Panel refers the matter back to Veterans Affairs Canada under section 21 of the *Veterans Review and Appeal Board Act* for a reconsideration and review under section 82 of the *Pension Act* of the issues that were determined in the 5 February 1998 decision and any additional information brought forward by the Veteran addressing the four statutory requirements which must be satisfied, in order to approve a claim for an additional pension for a child who is over the age of 18 on the basis of the child's infirmity, under section 34 of the *Pension Act*.

## **APPEAL RIGHTS**

If you are dissatisfied with this decision, you may appeal it to an Appeal Panel of the Veterans Review and Appeal Board, which may affirm, vary or reverse the decision.

In pursuing this right of appeal, you may be represented, free of charge, by the Bureau of Pensions Advocates or a service bureau of a veterans' organization or at your expense by any other representative.

**Applicable Statutes:**

*Pension Act*, [R.S.C. 1970, c. P-7, s. 1; R.S.C. 1985, c. P-6, s. 1.]

Section 2  
Paragraph 34(1)(a)  
Section 39

*Veterans Review and Appeal Board Act*, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3rd Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

Section 3  
Section 25  
Section 39

**Exhibits:**

- ER-K1: Psychiatrist's report from Dr. Paul M. Goldhamer, dated 3 March 2010 (one page);
- ER-K2: Extract regarding schizophrenia from *The Merck Manual*, 18th Edition (four pages); and
- ER-K3: Emailed statement, dated 4 March 2010 (one page).

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1. *Rioux v. Canada (Attorney General)*, 2008 FC 991